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REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS,

OF

UPPER CANADA;

**FROM HILARY TERM, 24 VICTORIA, TO MICHAELMAS TERM, 25
VICTORIA.**

**BY
EDWARD C. JONES, ESQUIRE.
BARRISTER-AT-LAW.**

o

VOLUME XL
SECOND EDITION.

TORONTO AND EDINBURGH:

CARSWELL & CO.

1883.

Entered according to Act of Provincial Legislature, in the year of our Lord one thousand eight hundred and sixty-two, by EDWARD COURSOLES JONES, in the Office of the Registrar of the Province of Canada.

Rec. Oct. 12, 1885

EVANS BROS., PRINTERS, FRONT STREET, STRATHROY.

JUDGES
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD OF THESE REPORTS.

The Hon. WILLIAM HENRY DRAPER, C.B., C.J.
" " **WILLIAM BUEL RICHARDS, J.**
" " **JOHN HAWKINS HAGARTY, J.**

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REPORTS OF CASES

IN THE

COURT OF COMMON PLEAS.

HILARY TERM, 24 VIC.

Present:

The HON. WILLIAM HENRY DRAPER, C.B., C.J.

“ “ WILLIAM BUELL RICHARDS, J.

“ “ JOHN HAWKINS HAGARTY, J.

IN RE. JOHN ANDERSON.

Ashburton treaty—Warrant of Commitment—Form of, omitting the words “murder” and “with malice aforethought.”

Held, that a warrant of commitment issued by a magistrate under the Ashburton treaty and our statute (Con. Stat. of Canada, c. 89) which used the words “did wilfully, maliciously, and feloniously stab and kill,” and omitted the words “murder,” and “with malice aforethought,” and concluded by instructing the gaoler to “there safely keep him (the prisoner) until he shall be thence delivered by due course of law,” did not come within the provisions of the treaty or statute and was consequently defective.

Held, also, that when a prisoner was brought before the court upon a writ of habeas corpus under our statute, the warrant of commitment upon which he was detained, appearing on its face to be defective, the court, before whom such prisoner was brought, had no authority to remand him, such power only being possessed by the court at common law, and the prisoner not being charged with any offence for which he could be tried in this province.

*The prisoner was brought before this court on a writ of habeas corpus, directed to the sheriff of the county of Brant. The return of that officer shewed that the prisoner was com-

*See the same case in the Court of Queen's Bench in Michaelmas Term last in which the decision was given on the question of law.

mitted, and was detained in custody for the following causes—first upon a warrant as follows:

“PROVINCE of CANADA, } To all or any of the constables
County of Brant. } or peace officers in the county of
Brant, and to the keeper of the
common gaol of the county of Brant, at Brantford, in the
said county of Brant.

Whereas John Anderson was this day charged before us, two of her Majesty's justices of the peace in and for the said county of Brant, on the oath of William C. Baker of Howard county, Missouri, and others, for that he, the said John Anderson, did, in Howard county, in the state of Missouri, on the 28th day of September, 1853, wilfully, maliciously and feloniously stab and kill one Seneca T. P. Diggs, of Howard county.

These are therefore to command you, the said constables or peace officers, or any of you, to take the said John Anderson, and safely him convey to the common gaol at Brantford, aforesaid, and there deliver him to the keeper thereof, together with this precept.

And I do hereby command you, the said keeper of the said common gaol, to receive the said John Anderson into your custody, in the said common gaol, and there safely keep until he shall be thence delivered by due course of law.

Given under my hand and seal, this 28th day of September, in the year of our Lord 1860, at Brantford, in the county of Brant aforesaid.

(Signed,)

W. MATTHEWS. J. P. [L.S.]

HENRY YARDINGTON, J. P. [L.S.]

JAMES LANGHEY, J. P. [L. S.]

Second.—Upon a rule of the Court of Queen's Bench of Upper Canada in the words following:

“In the Queen's Bench, Michaelmas Term, 24 Victoria.

UPPER CANADA, } John Anderson being brought here
County of Brant. } into court in the custody of the sheriff
of the said county of Brant, by virtue
of a writ of habeas corpus, it is ordered that the said writ, and the return thereto, be filed; and upon reading the several informations upon oath of William C. Baker, Thomas

D. Diggs, Benjamin Hazlehurst, J. A. Halliday, a man named Phil, and Benjamin F. Diggs, returned in obedience to a writ of certiorari, directed to William Matthews, Esquire, one of her Majesty's justices of the peace in and for the county of Brant, and upon hearing counsel for both sides it is ordered that he, the said John Anderson, be recommitted to the custody of the keeper of the gaol of the said county of Brant, upon the warrant under which he hath been by him detained, to remain in the common gaol of the said county of Brant, until a warrant shall issue upon the requisition of the proper authorities of the United States of America, or of the State of Missouri, for the surrender of the said John Anderson, to be tried in that state for the murder of one Seneca T. P. Diggs, according to the treaty between Her Majesty and the United States of America, recited in the statute of Canada, passed in the twenty-second year of Her Majesty's reign, chapter eighty-nine, or until he shall be discharged according to law. By the court. Dated 22nd December, 1860.

The informations, depositions, proceedings and evidence taken against the prisoner, were also returned upon a writ of certiorari as follows:

"PROVINCE OF CANADA, } The information and complaint
County of Brant. } of James A. Gunning, of the city
of Detroit, in the State of Michigan, taken this thirtieth day
of April, in the year of our Lord 1860, before the undersigned
one of Her Majesty's justices of the peace in and for the said
county of Brant, who saith, that one John Anderson did, on
the twenty-eighth day of September, A. D. 1853, wilfully,
deliberately and maliciously kill one Seneca T. P. Diggs, in
the county of Howard, in the state of Missouri, one of the
United States of America, all of which this deponent doth
verily believe."

"PROVINCE OF CANADA, } Examination of John Anderson,
County of Brant. } charged by J. A. Gunning with
having wilfully, deliberately, maliciously and feloniously
murdered one Seneca T. P. Diggs, of Howard county, in the
state of Missouri, one of the United States of America, on
the 28th September, 1853."

"Prisoner by counsel, G. M. Wilson, Esq., denies the charge. William C. Baker, sworn, says: I live in Howard county, in the state of Missouri; I have lived there ever since 1844, except one year; I lived in the same state during that time, part in Salina county, part in Jackson county; I work at the carpenter's trade, and sometimes work on a farm. I know the prisoner; he was a slave and belonged to Moses Burton, of Howard county, state of Missouri, when I first knew him; I became acquainted with him in the fall of 1844. He lived with Mr. Burton when I went to Missouri in 1844, and continued with him until 1853; he went by the name of Jack Burton; the last I saw of him was in 1853, until I saw him in this country. I am certain of Anderson's identity; I did not see him from 1853 until I came here; Burton transferred him in 1853 to McDonald, of Salina county, about thirty or thirty-two miles away, that is Burton's from Macdonald's. Anderson had a wife; she lived with Samuel Brown in Howard county; that was a mile and a half or two miles from Burton's. I know a man of the name of Givins; he lived about six miles from Brown's; Seneca T. P. Diggs and Givins lived on adjoining farms. I know Anderson was in the neighborhood of Brown's in September, 1853; I lived in the neighborhood of Brown's since 1853; I have not heard of Anderson's being there since 1853; I first saw Anderson in Simcoe gaol, in Canada; he was brought out and two other colored persons with him; I knew him the moment I saw him; he has a mark on his fingers; his right forefinger is stiff on the joint. I heard he had a cut on one of his legs; don't know this from my own knowledge. Diggs, Brown, Givins, and myself all lived in Howard county; Diggs is not now living. I saw him lying in bed suffering from a wound he received from a knife; he died in fourteen days after he was stabbed; he lived four days after I last saw him; I saw him twice after he was wounded; the first time I saw him he told me a man by the name of Jack, who belonged to a man of the name of Macdonald, of Salina county, was passing his farm and spoke to him and asked him the way to Charles Givins; Diggs said he told him to go in and eat dinner and he would go to Givins with him;

he further stated that he started to go to the house; he (Diggs) thought that Anderson was going in. Jack told him he was going to Givins for the purpose of getting Givins to buy him. He then broke and ran away; he called out to his black boys to catch him; they ran in a circle, and after running for some time, when Mr. Diggs was going over a fence Jack came in contact with him and stabbed him. I saw one cut in his right side; the doctor told me he would die; this took place the same day; he seemed to be suffering very much when I saw him; the doctor said he would die from the wounds; I know he had a stiff finger ever since I was acquainted with him; don't know how he got it; I have frequently had hold of his hand. I saw Anderson once in September, 1853, in Howard county, a day or two before the cutting of Diggs; he was on Brown's farm; he was running from a couple of my neighbors to keep them from taking hold of him; they wanted to deliver him up to Macdonald. He had been out from McDonald about three weeks; they supposed Anderson ran away from McDonald's, as his wife was on that side of the river. Mr. Diggs said he asked Anderson if he had a pass. There have been slaves escaping occasionally from there. I did not swear that Diggs told me he had received but one cut; the doctor's name was Samuel Crewes; he was understood to be a regular physician, practising for years. The county of Howard employed me to come over here; I had no authority; I came to identify the prisoner; county of Howard is to pay me for this; they pay my expenses and \$2.50 per day; I draw it from the clerk; the clerk's name is Charles H. Stewart; I am not paid from other persons or from other sources. Mr. Diggs, when I first saw him, understood what he was talking about."— (Adjourned).

"W. C. Baker, re-called. I live in Howard county, state of Missouri. Anderson was a slave then in Missouri; I did not see the wound made. Diggs told me it was about dinner time when he first saw Anderson; he asked him to take dinner at his house; when Anderson broke away from him, Diggs was trying to stop him; Diggs was trying to stop him from running away from his master, McDonald; I under-

stood he was going to Givins to be sold; he went towards Givins' to induce him to buy him. A slave does not sell himself, but sometimes he tries to get an exchange of masters; but they have no right by law to do so. He was going to induce Givins to buy him. Diggs told him the law of the state compelled him to stop him if he had no pass; Diggs asked him to go to his house; Diggs said they started to the house, when they got on a piece Jack broke loose and broke away. It was at dinner time when he saw Jack first, and told him to go to his house and get dinner and he would go along with him. After he broke and ran from him, the parties who pursued him made a circle; Jack ran in a circle; Diggs called to his black boys to catch him; they started after him; there were three or perhaps more black boys; Diggs was going to stop him to return him to his master McDonald, in slavery. It was in that pursuit that Diggs was stabbed and got his death blow, did not understand from Diggs it was to do Jack any harm they tried to catch him, but merely to return him. From the time I knew Anderson his character was bad, he was savage and ill disposed. As they were making a circle, Diggs was getting over a fence; Jack was coming towards him and tried to stop him, and he (Diggs) was going to take hold of him to stop him; Jack was coming towards him and stabbed him; as Diggs got over the fence they came in contact, and he received the stab. Diggs had gone to the fence to stop him; so he said to me. The prisoner had difficulties with the man who raised him; he refused to do what he was bid; on one occasion he refused to catch his master's horse when he was told; he and his master had some words; there were no blows struck; don't know personally any other act, but his public reputation was bad for stealing and being a thief; don't know he was ever convicted. The neighbors said he stole; don't know he ever stole from his master; he was accused for stealing chickens eggs and butter; don't know that he was ever brought before a justice for it. Sam Brown accused him of this. John M. Harris and John C. George Brown accused him of stealing eggs; the others of butter and chickens; can't say when it was. These accusations are common there against the colored

people; in 1847 and 1848 I heard this; he was there at this time, but he was not taken up for any of these things."

"Benjamin F. Diggs, sworn, says: I live in Howard county, state of Missouri, United States of America; I am 15 years old the 30th of May last; I am son of Seneca T.P. Diggs; he is now dead; he died in the fall of 1853, in the month of November in that year, the 11th I think; the cause of his death was two wounds he received from a colored man who inflicted them with a knife about 12 o'clock in the day. Father was a farmer; I was with father when he was stabbed; about five or six yards from him; he was in pursuit of the nigger when he was stabbed; I was with father when he first started in pursuit of him. Other parties, say four, black boys of my father were following up. I was with father and could not keep up, and he stayed with me. When he was stabbed he had got over the fence; when the nigger had got to him I was on the fence; father was about six yards from the fence; saw him stab father. There was nobody with the man or father but me; I saw the knife; it was a long dirk knife. Father was first stabbed in the breast; after that father turned to run away, and hung his foot in some vines and fell; the man then stabbed him in the back and then broke and run. Father got up and walked a piece and fell about fifteen or twenty yards. This was about a mile from our house; father lay about an hour when he fell last; no one was with him but me during that time; I saw his wounds; he pulled down his shirt and shewed them to me; two wounds I saw them inflicted by this man; one on the breast the other on the back. The other parties were still running after the nigger. After this we heard some one hollow, and father told me to answer; I did answer; father was not able to get up. Dr. Crowes and one of our own nigger men first came up. The doctor lived about half a mile from where father was stabbed; after a while another of our niggers came up and he and I went to Bass' to get quilts to carry him over the creek; they lived about a quarter of a mile off. A sleigh was brought, drawn by a horse; father was put on the sleigh and taken to Dr. Crowes; he stayed there until he died; he never went home after. Had never seen the man who stabbed

father before that time. The prisoner is about the color and size of the man, but I would not swear he is the man. I, was not present at the first; what I saw first was father and some of the black boys; one told me it was a runaway. there were two men and two boys from seventeen to nineteen years of age; they were walking along; I asked one of the boys who the strange black man was; he told me some one said he was a runaway; I walked along towards our house to dinner; this man was going along; they came in sight of a house in a field, when the stranger broke and ran and left the rest; that is he run away from the rest through the woods from the others pretty fast; he appeared to run as if he was trying to run away; don't know what the others thought; they ran after him. Father told them to run after him; father wanted to give him back to McDonald. Moses Burton used to own him. He tried to get away so that father could not deliver him back to his master. Father told the boys to go after him and catch him. They were present these men; four went after him, all blacks; father told them to catch him; father also ran after him; don't remember if he hollowed, but he went after him. The nigger and our men ran in a circle; father and I went across, and father had just got over the fence; the nigger and he met; did not hear any words pass. I took a deposition once before Mr. Halliday, J. P. Father had a little stick in his hand; the nigger ran at him with an open knife drawn in his hand; it was a paw-paw stick; my father struck at him with the stick after the nigger had run at him with the open knife; the stick hung in some bushes and broke; the nigger then stabbed father; father raised the stick to keep the nigger from cutting him with the knife as he ran at him. They had run across our woods pasture before this happened; it would be between a quarter and half a mile; more than half an hour or an hour, or perhaps not so long, but he did not go far from our farm; he was trying to get away, and they trying to catch him. Our colored boys were about twenty yards off when father was stabbed."

"Thomas D. Diggs sworn, says: I am the son of Seneca T. P. Diggs, of Howard county, state of Missouri; I have

always resided at home; I was not at home when my father received his wounds. When I returned home I found my father in bed; he was suffering very much; he never rose from a bed of suffering; he never spoke of recovering; he thought he would not get well. The doctor told the family my father would not get well. Two or three days before my father's death, he wished to speak to me, and I went to him; and he said he would soon be dead—he could not live much longer. He spoke of my mother, and brothers and sisters; he spoke of the cutting affair; he said he went to the barn with the hands to take in tobacco; he got through before twelve o'clock, or a little before; he started for dinner; he came across a nigger; he had no pass; he asked him where he was going to, and whom he belonged to; the nigger told him he was going to Charley Givins' to get him to buy him; he belonged to a man on the other side of the river of the name of Macdonald; he said he did not want to live on the other side of the river; Samuel Brown had his wife; my father asked him if he had a pass; he said no; my father told him it looked suspicious, living so far off; he must be a runaway; my father told him he could not allow him to go without a pass, as he would be held responsible; he told him to go to the house and get his dinner, and he would go with him to Charley Givins' and he would see about the matter. He started on to the house; the nigger was going on very quietly, all at once he started off and ran; he said he told his negroes to catch him; they started after him and he went with my brother; he was not able to go so fast and he stayed with him; after they ran around some time the negro met him; the negro ran at him and stabbed him; he had a little stick in his hand, and as the negro ran at him he struck at him. The negro cut him a little in the wrist; then he stabbed him in his breast; the blow stunned him, and he turned to leave, and his feet caught in something, and while he was in the act of falling, or had fallen, he stabbed him again in the back; the negro then immediately ran. The paw-paw is a very light wood—it never grows large; the one my father had was small. I am 25 years old last December; my father was a delicate man,—slim and small;

his height was six feet; he was slight spare made; he would not be able to cope with prisoner; his health was not good; they considered the negro a runaway; my father's was about thirty miles from Macdonald's, as I have heard; he did not live in the same county with father; I suppose my father wanted to catch the negro; I would suppose he wanted to return him to the owner. He was a slave I have no doubt; prisoner is about five feet eight or nine inches; his weight is about one hundred and sixty and (or) seventy pounds; my father's usual weight was one hundred and thirty-five and (or) forty pounds; when the negro ran at my father he had the knife drawn in his hand.

J. A. Halliday sworn, says:—I live in Howard county, state of Missouri; have been there since the month of June, 1829; I was born there; am a lawyer by profession. The 1st sec. 3rd article of the act concerning slaves, revised statutes 1845, for the state of Missouri provides, that any person may apprehend any negro or mulatto, being or suspected of being a runaway slave, and take him or her before justices of the peace. The 2nd sec. provides that the justice shall take possession of and deliver him or her to the owner. The 18th sec. of the same article provides that any slave found to be more than 20 miles from his home shall be declared to be a runaway. The 16th sec. provides that any one apprehending a runaway shall be paid the sum of \$5, if taken within the state, and \$50, if taken without the state, and ten cents for every mile of travel in order to convey the runaway home to his master. This law was in force in 1853, and is still in force in substance. I heard of the death of Mr. Diggs at the time it took place, and have not heard of the death of any other person there since, in that way, nor for several years before. I don't know that I ever saw the prisoner until the other night; I may have seen him, but don't know that I have.

B. Hazlehurst sworn, says:—I live in Brantford; am a county constable; prisoner made no statement to me but what he said in court; he said he was attempting to get away, and he cut a man, but he didn't believe he was dead. This took place in the state of Missouri. He said he was

chased in attempting to get away, and he cut a man. I understood he was getting away from slavery.

Mr. Freeman, counsel for the prisoner, consents that the evidence of Phil., a slave, shall be taken as evidence.

Phil., a slave, the property of Frances A. Diggs, widow of Seneca T. P. Diggs, of lawful age, being produced, sworn and examined, deposes and saith:—Next fall will be seven years ago a negro came to us (my master, Seneca T. P. Diggs, and the balance of the negroes) in my master's field; my master asked him if he had a pass; he said he did not have a pass; master told him he could not let him go clear without a pass; he told my master that a man by the name of Burton raised him; that he now belonged to a man over the river by the name of Macdonald; that he had a wife at Mr. Sam. Brown's in Howard county; that he was then going to Mr. Givins' to get Givins to buy him; master told him he could not let him go on that way without a pass; that he must go up to the house and eat dinner, and then he would go with him up to Mr. Givins'; he told master that his name was Jack; just before he got to the house the negro broke and ran; master told us negroes to run after him; master said we should have the reward if we would catch him; while we were running him he took out his knife; we runned him around a good long while; master would hollow all the time and we would answer him; at last master met the negro, and I saw him cut master twice with a knife; I saw him when he ran at my master with the knife; while we were running after him he said he would kill us if we came near him; we ran after him some time after he stabbed master, but could not catch him; the negro that killed my master was named Jack; he once belonged to Moses Burton, of Howard county, and had a wife at Sam. Brown's; I knew him, and have seen him before the day he killed my master; this happened in Howard county, Missouri, in the United States of America, in the year 1853.

This deposition was made by A. Halliday, J. P.; the same was examined as a witness before

the United States, before J. [Name] is assumed, as was the examining magistrates.

These writs and the returns thereto were filed on motion of the prisoner's counsel, and without objection or observation on the part of the counsel for the Crown.

S. B. Freeman, Q. C., after having read the writs and returns thereto, and the deposition as above, proceeded as follows :

I shall contend 1st. That the prisoner is entitled to this writ, and to have the evidence or cause of his commitment and detention enquired into under it.

2nd. That the evidence is not sufficient to put him upon his trial for, and sustain the charge of, murder, assuming that the whole transaction is to be judged by our laws.

3rd. That by the treaty and our statute, the criminality charged is to be determined by the laws of Canada.

4th. That even if we are bound to administer Missouri law, the depositions do not show that that state had any power to make such a law as that proved by *Mr. Halliday*, and such power will not be presumed inasmuch as that law is against natural justice; that the treaty is with the United States, and the offence charged must be murder according to the laws recognized by the Union.

5th. That the word "murder," used in the treaty, means murder according to the laws of both countries.

My learned friend, *Mr. Cameron*, will, besides supporting these points, urge some technical objections to the proceedings of the magistrate.

Personal liberty, or the right to be free in our persons, and to use them as we think fit, and personal security, or the right to be protected against injury to our bodies or danger to our liberty *are natural rights*, and these rights cannot be affected but by due course of law. 1 Blackstone Com. 121, 122; and to prevent this being done, the right to the writ of *habeas corpus* would appear to be necessary, and it is called a writ of right. Instances of this having been granted and the cause of the detention of the prisoner having been enquired into under it, will appear in *Hurd on Habeas Corpus*, 589, 596, 625; In *re. Kaine*, 14 Howard, Rep. 103. I also refer to *Kermott's case*, 1 vol. of cases in Judge

Chambers, p. 253, and Reg. Tubbee, 1 Prac. Rep. 98, in our own courts.

It has been doubted whether, if the commitment is regular, and shews an offence over which the party making it had jurisdiction, and for which the accused might be committed, a judge or court of superior jurisdiction can look at the evidence upon which the commitment was made, Hawk, b. 2; but it was done in the cases to which I have referred, and it appears to me that when our *Magna Charta* forbids arbitrary imprisonment and punishment without lawful trial, or in other words declared that no one should be imprisoned but by the law of the land; some machinery must be implied to prevent it being done. Though the law permits every man to defend his person, and to repel by force any unlawful invasion of it, such force not exceeding the necessity of the case, yet it is obvious that right affords no sufficient protection, nor is it sufficient that the guilty party may be punished for his violence, or that the party injured may have a civil action for damages, and therefore this writ *de homine replegando* or writ of *habeas corpus*, is given at common law, in respect to the person, by which a man may be replevied. The right to this writ was not given, but was extended by 31 Chas. 2, ch. 2, and it might be rendered useless if it could be defeated by making the commitment answer the required form. Besides our Court of Queen's Bench in this case, after expressing some doubt on the point, looked at the depositions to see whether they disclosed an offence for which the prisoner should be held in custody.

Here, *Eccles*, Q. C., who appeared on the part of the Attorney-General, stated that it was the wish of the Attorney-General that the whole matter should be gone into, and he would concede the point his learned friend was contending for.

Freeman, Q. C.—My next point is that the depositions taken before the magistrate would not be sufficient to commit the prisoner for trial for the crime of murder, if the whole transaction had occurred in this country. The law relating to murder is easily understood. The homicide must be a killing with malice aforesaid. If it is committed under

great provocation, as in the defence of the person or liberty, it cannot be murder. It appears that the prisoner had been held by one McDonald as a slave; that he had run away from him with an intention of asserting his liberty; that when he was crossing Diggs' farm, he and four of his slaves pursued the prisoner, who, in endeavoring to escape ran in a circle, the slaves followed the prisoner, while Diggs and his son ran across to head him, and prevent his escape, and in this manner the prisoner and Diggs met, when the prisoner struck Diggs in the breast with a knife, and then again in the back, and then succeeded in making his escape. Mr. Halliday's deposition proves that by a statute of the state of Missouri any one may capture a runaway slave, or any one suspected of being a runaway slave, for the purpose of having him returned to his master.

Now the force which may be used by a man in defence of his person or liberty must depend upon the imminence of the danger or injury to which he is exposed. In the present instance the prisoner was threatened with perpetual slavery. After Diggs was stabbed, and while he was lying on the ground for an hour, his four slaves were still pursuing the prisoner, though they were within twenty yards of Diggs when he was stabbed, and knew the fact. It appears also from the depositions of Phil., the slave, that the prisoner brandished the knife some time before he and Diggs met, and threatened to use it to effect his escape if necessary, and yet they continued to chase him. It is therefore abundantly manifest that the prisoner saw no other means of escape than by his fleetness or by violence. Then what is the condition of a slave? In that condition he is deprived of any thing which he would be legally justifiable in taking the life of another to maintain? Upon this point it appears to me there is no room for doubt. Mr. Cobb, in his work on slavery, after referring to the natural right of man, such as the right of personal liberty, the right of personal security, the right to acquire and enjoy property, and the right of self-defence against immediate and great injury, says that a slave has none of these rights, that his condition is just the reverse of a man having such rights, and in effect to under-

stand his condition, is to consider a human being deprived of all these rights, or a man used and treated as a brute by his fellow man for gain—his interest alone is the extent of the slave's protection. He can have no social enjoyment. Marriage is not recognized, and his children follow the condition of the mother, and necessarily so, as the father is seldom known. In some of the states their masters breed them for the market, upon the same principle that an English farmer would breed cattle, and sell both old and young with the same disregard to the feelings of humanity. The punishments inflicted upon slaves is in many instances very severe. One or more teeth are frequently extracted, or a letter branded on the skin, or a slit made in the ear, as marks by which they can be easily identified if they should run away; but this is more frequently done for the purpose of preventing them from escaping, than for punishment, for while labouring under the conviction that they bear the marks of identity on their persons, they do not entertain so strong a hope of being successful in any attempt to escape as they otherwise would. Again, the fact of their being reasonable creatures suggests a reason for punishing them, in cases where an irrational creature would not be punished. If a farmer's horse breaks out of his pasture and runs away, the owner does not punish him for it, because the animal cannot understand the object of it, and the vice in him cannot be cured in that manner, but the slave does not so escape. Humanity, therefore, as it exists in the slave, renders his condition worse in this respect than if he were a brute.

Slaves are used and sold like any other property with a few exceptions.

One exception is that if a white man by violence has carnal knowledge of a female slave, he is not criminally responsible. In this instance she is not looked upon as either a human being or a brute, but only so much of a human being as to prevent the connection being unnatural, and an abominable crime, not to be named amongst Christians, and yet so much of a brute as to prevent it being a rape. When a female slave is so injured, the only party who can complain is the owner, who can bring a civil action against the offender

for damages upon the same principle and to the same extent that damages are recovered for a trespass or injury committed to any other personal property. Cobb on Slavery. Flogging is the most usual correction, and it is inflicted not only to reclaim the vicious and subdue the obstinate offender; it is used also to strike terror into the minds of all, for this is the only feeling that keeps the slave in subjection. If their condition is in a material point of view better than it would be if they were free, they do not know it. The thirst for liberty is implanted in the breast of every human being; and his nature tells him that it is right for him to fight to obtain and maintain it, but the doubt of success keeps the effort down, but the will remains and grows stronger as the oppression increases.

There is also another exception. If a white man wontonly kills a slave, it is, I believe, by the laws of most of the states, murder, but this law as far as practice goes, is a dead letter. Corporal punishments frequently result in death, and it being legalized, and slaves not being allowed to give testimony against a white man, or to take part in any judicial proceedings to which a white man is a party, it is not surprising that such a law is practically a nullity.

His condition is shewn to be that of a brute in this case: one Robert Brocket was indicted for cruelty, inhumanity, and maliciously cutting, threshing, and beating a negro slave called Nat, reported in 2 Cranch Rep. 441. On the part of the defendant, his counsel contended, that if the whipping were private there was no limit to it, so that it did not extend to voluntary killing or mutilation. Mr. Swan, for the prosecution, referred to *Respublica v. Teischer*, 1 Dallas, 335. The verdict of the jury was, "that the traverser was not guilty of the counts as stated in the indictment, but recommended that the court should express their strong disapprobation of similar conduct." The case in 1 Dallas was against Teischer for maliciously, wilfully and wickedly killing a horse. Slaves are then placed on the same footing as a horse as to the criminal responsibility of white people for violence inflicted upon them not resulting in wilful killing.

"Imprisonment" in law does not mean a confinement in a prison or place established by law for the safe keeping of prisoners only. Any illegal restraint, or custody by one person of another against his will is an imprisonment. A slave is under duress and suffering imprisonment so long as he is a slave. He and his master are in a state of constant warfare. The condition of the captive negro in a slave ship is thus described by Mr. Walsh in his notices of Brazil in 1823 and 1829, "Over the hatchway stood a ferocious-looking fellow, with a scourge with many twisted thongs in his hand, who was the slave-driver of the ship, and whenever he heard the slightest noise below he shook it over them and seemed eager to use it. As soon as the poor creatures saw us looking down to them, their dark and melancholy visages brightened up, and seeing that we sympathized with them they began to shout and clap their hands. The circumstance which struck us most forcibly was, how it was possible so many human beings could be pressed together in so small a space. The cells were only three feet high, and the greater part of them shut out from light or air; 226 of these creatures were crowded into a space of 288 feet square, and 336 into another space of 800 square feet, giving to the whole an average of only 23 inches, and to each of the women only 13 inches, though many of them were pregnant. They were allowed to come upon the deck, 507 fellow creatures of all ages and sexes, some children and some adults, some old men and women, all in a state of total nudity, scrambling out together to taste the luxury of a little fresh air and water. Upon looking into the cells we found children next to the side of the ship nearly in a torpid state; when the water was brought, the extent of their suffering was made more manifest; they all rushed like maniacs towards it. They shrieked, struggled, and fought with one another for a drop of the precious liquid as if they were rabid at the sight of it."

The same inhumanity to man which is here described as practiced at sea is also practiced on land where it is the interest of the master to do so. The slave trade at sea and the slave trade on land is conducted on the same principle—

namely, that of gain. If there is any difference in the inhumanity between purchasing grown up human beings from the King of Dahomy and transporting them across by the middle passage and breeding young ones for the yoke, it would appear against the latter practice. Such, then, being the state from which the prisoner had escaped, and to which Diggs intended again to subject him, the question is, whether the prisoner could use any force to protect himself? And if any, could he take the life of Diggs for that purpose? If the prisoner had the legal right of resistance, there is I think, no room to doubt his right to kill his assailant under the circumstances. It was, however, contended in the other court that the force used was so wanton and excessive as to make it a question for a jury to say whether the killing would not amount to murder. It is not quite clear what the opinion of the learned Chief Justice and Mr. Justice *Burns* was on this point. But I submit that the Chief Justice viewed the evidence as being more against the prisoner than it is. In one part of the Chief's judgment in describing the acts of the parties, he says, "Anderson, when Diggs had got about six yards from the fence *turned upon him*, having an open knife in his hand and ran at him. Diggs struck at him with a stick, which caught in some bushes and broke, and then Anderson stabbed Diggs with his knife (long clasp-knife) in the breast. Diggs turned to run from him, and caught his foot in a vine and fell, *when Anderson went up to him and stabbed him in the back and ran off.*" And in another part of his judgment he describes it in these words, "Diggs having, as it appears, authority to take him up and carry him before a magistrate under the general law of the state, it cannot be said that he was acting illegally at the time that Anderson *rushed upon him and repeatedly stabbed him with a deadly weapon.*"

I submit that the depositions do not, taking them all together, show that Anderson, *turned upon Diggs and ran at him* or *that after Diggs fell, went up to him and stabbed him in the back and ran off*, or that he *rushed upon and repeatedly stabbed him in the manner above stated*. To make myself clear in this most important point, I must refer to the depositions.

The first witness was Baker: he relates the transaction as Diggs told it to him, as follows: "Diggs said he told him (Anderson) to go in and eat dinner, and he would go to Givins' with him. He further stated he started to go to the house; he (Diggs) thought Anderson was going in. He then broke and ran away; he called out to the black boys to catch him; they ran in a circle, and after running for some time, when Diggs was going over a fence, *Jack came in contact with him and stabbed him.* * * *

Diggs was going to stop him and return him to his master, McDonald, in slavery. It was in that pursuit that Diggs was stabbed and received his death blow. As they were making a circle, *Diggs was getting over a fence; Jack was coming towards him; Diggs tried to stop him, and he Diggs was going to take hold of him to stop him; Jack was coming towards him and stabbed him. As Diggs got over the fence they came in contact, and he received the stab. Diggs had gone to the fence to stop him—so he said to me.*

Benjamin F. Diggs, who was with his father (the deceased) at the time, makes nearly the same statement: he says—

"I was with father and could not keep up, and he stayed with me; when he was stabbed he had got over the fence; saw him stab father; father was first stabbed in the breast; *after that father turned to run away and hung his foot in some vines and fell; the man then stabbed him in the back, and then broke and ran.*" On cross-examination he says:

"He (Anderson) appeared to run as if he was trying to get away; don't know what the others thought. They ran after him; father told them to run after him; he tried to get away so my father could not deliver him back to his master; father told the boys to go after him and catch him; father also ran after him. * * * *The nigger and our men ran in a circle; father and I went across, and father had just got over the fence; the nigger and he met; did not hear any words pass; the nigger ran at him with an open knife drawn in his hand, &c.*

The other witness, Thomas D. Diggs, who was also a son of the deceased, relates the occurrence as the deceased told it to him on his death bed, as follows: "After they had

run round some time the nigger met him; the nigger ran at him and stabbed him; he had a little stick in his hand, and as the nigger ran at him he struck at him. The nigger cut him a little on the wrist, then he stabbed him in the breast. The blow stunned him; *he turned to leave* and his foot caught in something, *and while he was in the act of falling or had fallen, he stabbed him again in the back.* The nigger then immediately ran." This is the whole of the evidence upon this point, and I submit that it does not shew that more than a moment of time elapsed between the striking of the two blows; nor did it show that Anderson could have any reason to believe that the first blow had disabled Diggs so as to relieve him from his violence and the violence of others who had been instigated by him, and were then acting under his orders, or that Anderson knew that Diggs turned to get away—it was all done at the same moment and in one conflict; and so far from Anderson having turned out of his course of flight to meet Diggs to stab him, the depositions shew that they met solely through Diggs having crossed his path. Even the violence which Anderson used was not enough to save him from further pursuit; for although Diggs was lying on the ground the slaves continued to chase him; his capture seemed paramount to anything else, even the life of Diggs, which shews clearly that Anderson did not misjudge his peril, and that the blows he struck were indeed strokes for his liberty. The peril in which he was placed when intercepted by Diggs—the stripes—the cruel and merciless torture he would have to suffer, if he again fell into the hands of his master, were no doubt fully present to his mind. It could not be expected—it would be unreasonable and contrary to all law to expect, that any man placed in his situation should be held accountable for murder, even though it were true that after striking the first blow and continuing his flight, he did turn back, on seeing the pursuit continued, and strike a second time. The functions of a jury are to determine facts, and the judge always tells them if they find this or that fact, then they will find in this or that way, because from such finding the law draws the deduction.

In this case, assuming that the evidence which most

strongly tends to insulate the prisoner, to be the true state of facts, then whether he is guilty of murder is a legal deduction, or a deduction of law, and your lordships may determine it. It was not whether a jury might or would not convict under this evidence, but whether they ought to do so, for no one ought to be put upon trial, unless the evidence when taken in its strongest bearing is sufficient to sustain a conviction.

My third proposition is that by the treaty itself and on statute (Consolidated Statute C., ch. 89, sec. 1,) the criminality of the accused is to be determined by the laws of Canada.

The whole question hinges on this proposition. The treaty is recited in our statute as follows: "Whereas by the tenth article of the treaty between Her Majesty and the United States of America, signed at Washington on the 9th day of August, A.D., 1842, it was agreed that Her Majesty and the said United States should, upon mutual requisitions by them or their Ministers respectively made, deliver up to justice all persons charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek an asylum, or should be found within the territories of the other; *provided that this should only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed*, and that the respective judges and other magistrates of the two governments should have power, jurisdiction and, authority upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person *so charged*, so that he might be brought before such judges or other magistrates respectively, to the end that the evidence of criminality might be heard and considered, and that if on such hearing, the evidence *should be deemed sufficient to sustain the charge*, it should be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a

warrant might issue for the surrender of such fugitive." Our statute then recites the British statute which was passed to carry this treaty into effect, declaring that its provisions "have been found inconvenient in practice in this province, and more especially that provision which requires that before the arrest of any such offender a warrant shall issue under the hand and seal of the person administering the government, to signify that a requisition hath been made by the authority of the United States for the delivery of the offender as aforesaid, and to require all justices of the peace and other magistrates and officers of justice within their several jurisdictions, to govern themselves accordingly."

The first section of our act then declares that upon complaint made under oath or affirmation charging any person found within the limits of this province with having committed within the jurisdiction of the United States of America, *or of any of such states*, any of the crimes enumerated or provided for by the said treaty, any of the judges, justices of the peace, &c., may issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or justice of the peace, to the end that the evidence of criminality may be heard and considered, and if on such hearing, the evidence be deemed sufficient by him to sustain the charge according to the laws of this Province, if the offence alleged had been committed herein, he shall certify the same, together with a copy of all the testimony taken before him to the Governor, that a warrant may issue upon the requisition of the proper authority of the *United States, or of any of such states*, for the surrender of such person, according to the stipulations of said treaty, and the said judge or the said justice shall issue his warrant for the commitment of the person so charged, to the proper gaol, there to remain until such surrender be made, or until such person be discharged according to law."

The second section provides, "that in every such complaint as aforesaid, and on a hearing upon the return of the warrant of arrest, *copies of the depositions upon which an original warrant in any of the said United States* may have been granted, certified under the hand of the person issuing

such warrant, &c., may be read in evidence of the criminality of the person so apprehended."

What is the proper meaning to be given to these words in the statute. "And if, *on such hearing, the evidence be deemed sufficient by him to sustain the charge according to the laws of this province if the offence alleged had been committed herein,*" and of the words of similar import used in the provisos of the treaty? They were intended to be most significant. The majority of the Court of Queen's Bench have determined that the sufficiency of the evidence is to be determined by the judge or justice "upon his view of the transaction as described in the testimony taken in connection with the law of the foreign state where it occurs as regards the offence. And also with reference to the law which governs our own courts and magistrates in regard to the sufficiency of the evidence." I contend that our law is to govern, both as to the law of the crime and the rules of evidence. That the acts of Diggs in endeavouring to capture Anderson, as well as Anderson's resistance, are to be judged by our law. On the other side it will be contended that their acts are to be judged by the slave law of Missouri. "The good expositor," says Lork Coke "makes every sentence have its operation to suppress all the mischiefs; *

* * he gives effect to every word in the statute; he does not construe it so that any thing *be vain or superfluous*, nor yet makes exposition against express words, but so expounds it that one act may agree with the other, and all may stand together." (11 Rep. 34.) Now, it is laid down in *Ormichund v. Barker*, (Willis 549) that in trial of matters arising beyond the sea, our court can only receive such evidence as they would receive concerning matters arising here, and numberless other authorities might be cited to this effect. Then this being the law before this treaty was made, it would be making the words referred to in the statute vain and superfluous to say that they meant that the justice should take such evidence only as should be received according to our laws, and the above rule would be violated.

The Barons of the Exchequer in *Heydon's case* (3 Rep.

7) laid down the following rules for the sure and true interpretation of all statutes. They say that four things are to be considered :

1st. What was the common law before the making of the act ?

2nd. What was the mischief and defect against which the common law did not provide ?

3rd. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth.

4. The true reason of the remedy, and they add that it is the duty of the judge to make such construction as will suppress the mischief and advance the remedy "according to the true intent of the makers of the act." *Vattel* in his work on the law of nations, p. 247, says : "Since the sole object of the lawful interpretation of the deed (speaking of treaties) ought to be the discovery of the thoughts of the authors of the deed, therefore whenever we meet with any obscurity in it, we are to consider what probably were the ideas of those who drew up the deed, and to interpret it according." Again, p. 252. "Every interpretation which leads to an absurdity ought to be rejected." Again, p. 256, "When once we certainly know the reason which alone has determined the will of the person speaking, we ought to interpret and apply his words in a manner suitable to that reason alone;" p. 258, "When the sufficient and only reason of a provision is certain, we extend that provision to cases to which the same reason is applicable." On the other hand, p. 259, "If a case occurs to which the well known reason of a law or promise is inapplicable, the case ought to be excepted." Again, p. 266, "If the subject or the matter treated of, will not allow that the terms of the clause should be taken in their full extent, we should limit the sense according as the subject requires." Again, p. 262, "In unforeseen cases we should rather be guided by his intention than by his words, and interpret the instrument as he himself would interpret it, if he were on the spot, or conformably to what he would have done if he had foreseen the circumstances which are at present known;" p. 263, "The precise point of the will of the legislature or the contracting

parties, is what we must adhere to." The author then speaks of things *favorable* and things *odious*, and says: "All things which, without proving too burdensome to any one in particular, are useful and salutary to human society, are to be ranked in the class of favourable things. On the other hand, every thing that is in its own nature rather injurious, than useful to mankind, are considered odious—every thing that contains a penalty is odious;" p. 267, "When the will of the legislature is not precisely known, we should, when there is a question of odious things, interpret the terms in the most limited sense, and we may even adopt a figurative meaning in order to avert the oppressive consequence of the proper and literal sense, or any thing of an odious nature which it would involve."

The rule of interpretation laid down in 2 Cranch, 390. American report, is of similar import. It says, "Where rights are infringed, where fundamental principles are overturned, where the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such object." Also in 7 Mass. Rep., p. 525, this rule is laid down: "The natural import of the words of any legislative act, according to the common use of them, when applied to the subject matter of the act, is to be considered as expressing the intention of the legislature, unless the intention so resulting from the ordinary import of the words be repugnant to *sound acknowledged principles of national policy*, and if that intention be repugnant to such principles of national policy, then the import of the words ought to be enlarged or restrained, so that it may comport with those principles, unless the intention of the legislature be clearly and manifestly repugnant to them."

It will be urged that even if the laws of Canada are to be looked to in determining the guilt of the prisoner, yet that according to them if a man is killed by resisting him, where he is exercising lawful authority, it will be murder. And doubtless it would be, but there is a fallacy in the application made of that principle of law in this case, because if our laws are to be considered at all, they must be applied to the

acts of Digges as well as to the acts of the prisoner, and if Digges had attempted to imprison and reduce the prisoner to a state of bondage in Canada, his acts would have been entirely illegal, and he might have been resisted and his life taken if it were necessary for the prisoner to take it, in defence of his liberty.

Under the rules of interpretation which I have referred to, it becomes important to ascertain the policy of the British government in reference to slavery. I might refer to the philanthropy of the British nation in the expenditure of a million of dollars for the emancipation of slaves in her colonies, and to her heavy annual expense before and since in fitting out and maintaining cruisers to suppress the traffic on the sea, and using her position and power with other nations in drawing them into treaties with her for the same purpose, as she did by an article in this treaty, as affording conclusive evidence that she never could have intended to aid the master, by supporting and maintaining his authority over his slave as being the proper relation between master and man. But the history of the *Creole* case is now immediately in point. It will be found in the proceedings of the House of Lords, of the 14th February, 1842, and was as follows:—
“A vessel called the ‘*Creole*’ left Hampden, in Virginia, loaded with tobacco and slaves for New Orleans, on the 30th October, 1841. The slaves rose on the officers, crew, and passengers, and killed one passenger and severely wounded others, and compelled the first mate to navigate the vessel to Nassau in New Providence, a British island. The surrender of these slaves was demanded by the American government as being murderers and pirates, but the demand was refused. Lord *Denman*, in speaking on the subject, said:—
“It was desirable that a power should be established by which one country might be enabled to seize criminals for crimes committed in others, but such a right must be founded on the supposition that the laws of all countries were reasonable and just, for no country was entitled to enforce a law which was believed to be founded in injustice. Till the laws in each country were such as a Christian country ought to adopt, they could not be enforced by one another. He could.

not help expressing his wish that the distinguished persons who were at the head of the jurisprudence of America might be able to bring the laws of America into this state. Yet he could not but observe that the existence of the slave trade formed an insuperable difficulty to our government entering into any such treaty, or persuading the legislature to consent to such a law. Any state of the law in such a country might involve a decision on the question of slavery, and he was sure the government of England would never give any encouragement directly or indirectly to slavery; still less would they act as policemen or gaolers to enforce the rights of the master over the slave—they would rather rejoice that two hundred individuals who had been reduced to a state of slavery had restored themselves to liberty."

This language fully expresses the British mind on this subject, and one may reasonably urge, as doubtless it was so, that it was in this mind that the treaty was conceived and entered into. The leading and most important principle announced by Lord Denman is that "*no nation is entitled to enforce the law of another country which is founded in injustice;*" and such is the law of slavery. The construction contended for by the claimants of the prisoner would be enforcing this unjust law. On the other hand the one contended for by the prisoner would not enforce it. It cannot, therefore, in reason be said that the British government intended to treat such acts as those charged against the prisoner, as criminal, and this is, according to the above rules, the first point to be considered in the construction of all agreements, namely, the intention of the parties.

The next point is whether the language used in the proviso leads one to the irresistible conclusion, that the intention, contended for by the claimant of this man, is so expressed; for when a man's natural rights are taken away by a law, the intention to do so must be expressed with irresistible clearness. Every inhabitant, though not a subject, owes obedience to the laws of a country in which he resides, and as a correlative the laws of the country owe him protection, both in person, liberty, and property. Besides, this treaty applies to the subjects of each country sojourning or residing

in the territory of the other. Colored subjects of this country travelling through Missouri might be arrested by any white man who might suspect them of being runaway slaves, and every colored man there is presumed to be a slave, and if he cannot produce a pass the presumption arises that he is a runaway, and he may be arrested and imprisoned without any redress, according to the laws proved by Mr. Halliday. It never could have been the intention of Great Britain to put her subjects in this position.

However, to show the intention of the British legislature more clearly in reference to this treaty, I will read a few extracts from the debates in the British parliament upon the act passed for the purpose of carrying the treaty into effect.

Lord *Aberdeen* said—"Some people had supposed that a fugitive slave might be delivered up under this treaty—this he must say was a most unfounded notion—not only was a fugitive slave guilty of no crime in endeavoring to escape from a state of bondage, but he was entitled to the sympathies and encouragement of all those who were animated by Christian feelings."

Sir Frederick *Pollock*, Attorney-General, expressed the views of the government as follows: "He begged to call to remembrance what had occurred in the case of the 'Creole.' In that case the law officers of the Crown gave it as their opinion, that the liberty of escaped slaves should be protected—that we dare not give them up—that no law would tolerate such an act, and that the liberated slave should be as safe in the Bahamas as in the Royal Exchange. That opinion was given when slaves were absolutely demanded as criminals subject to the American law, and that the practical exposition of our law on that occasion ought, he thought, to be taken as a perfect pledge of the course which the government would most undoubtedly pursue, should future occasions arise. * * *

As he read the bill, any fugitive taking refuge in this country should only be given up upon evidence that *would justify his committal in this country*," and in reply to questions put to the government by Mr. *Macaulay*, the Attorney-General gave the following answer:—

"By the treaty no fugitive would be given up unless he

were liable to punishment under the laws of the country in which he had taken refuge, supposing the offence to have been committed there. In his opinion the magistrate would not enter into the enquiry of slave or no slave, at all—he would enquire into the alleged offence, and if punishable for it in this country then the fugitive would be given up."

Lord *Palmerston* said, "He understood if an offence would not be deemed such by the law of England, the magistrate would not be justified in delivering up the party, and as the law of England did not acknowledge slavery, an act of a slave in resisting coercion would not be considered the crime it would be held by the law of America."

Lord *Derby*, then Lord *Stanley*, said, "He did not hesitate to add that according to the opinion of the law officers of the Crown (referring to the case of the 'Creole,') the slave would not have committed piracy, as the seizure of the ship had not arisen from any felonious motive, but solely from an anxiety for liberty! As to the case of a female slave killing a man for attempting to rape her, which by the laws of slaveholding states was murder, his answer to all such cases was in simply referring to the words of the treaty, and if the act which provided that no extradition should take place unless the act be a crime according to the laws of the place (not where the offence was committed) but where the fugitive may be."

I do not urge these opinions upon your lordships as having the force of a judgment of a court, yet one must feel that these speakers and the British government intended by the proviso inserted in the treaty, to require that criminality should be made out against the accused, in the same manner and to the same extent that it would require to be if he were charged for trial in this country, and that the exculpatory as well as the inculpatory evidence should be judged by our law. It appears to me that the treaty and act require first, that the act charged as criminal must amount to one of the crimes named in the treaty according to the law of the country demanding the prisoner, and secondly, when his extradition is demanded, it must be made to appear that the same act would have amounted to the same crime, if it had been

committed in the country in which he was found. I can scarcely see how words could more fully and appropriately express such intention, than those which are used in the proviso and our act; but I need not carry my argument so far, for if the language will bear such construction in reason, then equity, humanity, and all rules of construction, require that such construction should be put upon it.

In view of the rule in *Heydon's* case, I would ask whether our government ever felt that self-emancipation by slaves was an evil which ought to be cured? Most certainly not. The evil to be cured was that high offenders sought refuge in each country, and according to the opinion of the jurists of each country, there was no power within the state to arrest and deliver them up to justice to the country from which they had fled. His act must be criminal according to the laws of both countries. This construction would secure mutuality between the contracting parties, and the surrender of all criminals that should be surrendered, and proper protection to all against the unjust laws prevailing in either country; for no government should surrender a subject to the laws of another country, who had not committed an act which would have exposed him to punishment if he had committed it in his own country. I do not contend that the laws of both countries should be literally the same in reference to any offence named in the treaty before extradition can be demanded, but I do contend that they must be alike in spirit, and directed to such subjects of legislation, as according to the well understood policy of both governments, were objects of municipal arrangement, and human bondage was not such a subject in this country.

My fourth proposition in effect is that the slave law of Missouri is not the law of the United States, and that the crime must be made out under the laws of the federal government. I speak with great distrust of my knowledge of the machinery of the American government, whether slavery is recognized by the constitution of the American government is a subject which has been a good deal discussed, both in their courts and by their press. I venture, however, to say that if the institution of slavery was *not seen* to exist then

no one would look for it or be surprised at not seeing it, after reading their constitution, and I believe it is maintained more because they believe it to be their interest to do so, than because they really feel that it exists by force of any legal enactment. In Somerville's case Lord *Mansfield* said "That slavery was so odious that nothing could be sufficient to support it but positive enactment." Diggs took his stand upon the slave law of Missouri—without that law even then his act would not have been legal.

The constitution of the United States is introduced by this preamble: "We the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for common defence, promote the general welfare, and *secure the blessings of liberty* to ourselves and our posterity, do ordain and establish this Constitution of the United States of America.

Art. 4th. "The right of the people to be secure in their *persons*, houses, papers, and effects against unreasonable seizure and searches shall not be violated, and no warrant shall be issued but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized."

Art. 5th. "No person shall be deprived of *life, liberty, or property, without due process of law.*"

The constitution is held by them to be the supreme law of the land, and it is a matter of daily occurrence to see the judges determining the illegality of their legislative enactments, on the ground that they are contrary to the constitution.

There certainly is no such positive declaration of slavery in this constitution; as Lord *Mansfield* declared to be necessary, to support slavery.

I am aware that *they* say a negro is not a *person*, or one of the people of the United States, and therefore he is excluded from the enjoyment of the liberty which that document gives to the white population. But suppose this is admitted, where is the positive enactment which deprives him of his liberty or makes him a slave.

This Missouri law is against natural justice, and the

authority of that state to make such a law will not be presumed.—*Bank of Australia v. Nias*, 20 Law Journal, Q. B., p. 284.

Though our statutes speaks of the offences committed in any of the states, the treaty is with the United States, and is for violation of the laws of the federal government and not of the laws which any state may unconstitutionally enact.

I feel a deep interest in this prisoner's case, because he is demanded as a criminal for doing what I must approve, holding as I do that "to fight not to be a slave is noble." I have referred to the judgment of the Court of Queen's Bench, as standing between this man and liberty, and which would have consigned him to the merciless grasp of the slave owner and to certain death, probably without the semblance of a trial. I am sensible that the learned judges of that court were impressed with the tone of public feeling in this case, and would gladly have yielded to it, if they had not felt that the majesty of the law demanded of them the sacrifice of the finest feelings of the human heart, and I believe they join me in the wish that your lordships may come to a different judgment, one that will emancipate the prisoner, and bid him "go forth from this temple of justice in the dignity of a British subject and the majesty of a free man."

M. C. Cameron, for the prisoner, considered the first point required no argument, he contended that any doubt as to the construction of the act must be considered in a favourable light for the prisoner. No subject that has not put the law in motion in his own country can come here and claim a criminal. A slave is only a chattel in the states, and Congress has no authority to make laws in relation thereto; *Dred Scott's case*, 19 Howard, 393. A man who kills another in defence of liberty cannot under our law be guilty of murder. *Howell's State Trials*, *Stevenson's case*, 19 Howell 846; *Story on Conflict of Laws*, sec. 104, p. 191; *Blac. Com. Book 4*, p. 67; *Saul et Creditors*, 8 Martin (Louisiana) 679; *Andrews' case*, 6 Louisiana, 291; *Forbes v. Cockrane*, 2 B & C 448, 470; *Story's Conflict of Laws*, sec. 619, 620, p. 1011. He

contended that the original warrant was informal, citing *Ex parte Besset*, 6 Q. B. 481.

Eccles, Q. C., for the Crown, stated that it was the desire of the Attorney-General to aid the prisoner, and give him every opportunity of appealing to the courts.

The construction of the treaty he contended was the simple question to be decided.

1st. Is the law of Missouri to be read to aid the court in construing the treaty?

2nd. Does such a law exist?

3rd. Was Diggs acting legally?

4th. If he was not, the question of excess may arise on a trial.

5th. The question is not whether the prisoner is guilty of murder, but whether the question of criminality was deemed sufficient according to the laws of the province.

As to the first point he contended that the laws of the country where the crime has been committed must be read to ascertain the criminality of the prisoner; he will have to be tried by those laws if given up. Suppose a forgery were the crime charged, the law of the country where committed would have to be looked at to judge of the criminality, so must the law as to murder by slaves as well. The second question was proved by a professional man as a matter of fact.

He contended as to the third point that Diggs was acting legally; if not (fourth point) was the excess legal. If acting legally, resistance was illegal, and killing in so resisting was murder.

Assuming Diggs had no authority to arrest the prisoner, he would not be guilty of murder unless he exceeded the proper limit in defence of liberty and property.

The point in favor of the prisoner is his free agency, not being under the protection of the law he cannot be responsible for the penalties of the law.

R. A. Harrison, on the same side :

1st. To determine whether an act is crime or not, we must look to the laws of the place where the act was done.

2nd. While investigating facts to see whether or not the crime has been committed, our law of evidence is to govern.

3rd. To slay an officer, or other person having authority to apprehend or detain, is murder within the treaty.

4th. To determine the question of legal custody, we are bound to look at the law of Missouri, and what has been there done under it.

5th. Under the treaty we are only to look at the fact of legal custody, and have no right to sit in judgment on the laws of Missouri.

6th. 'It is for the magistrate here to investigate—not to try and determine.

7th. If we determine to surrender the fugitive, we have nothing to do with the consequences of the surrender as to the trial in Missouri, whether it will be just or unjust. The consequences should not in any manner influence our judgment.

8th. Whether the law of Missouri is looked at or not, the evidence here shews, that if the prisoner were a white man accused, there is sufficient to put him on his trial on the charge of murder.

First.—Crime cannot be separated from locality. Crime is an offence committed by an individual within the jurisdiction of a state against the laws of that state, and there subjects him to punishment. I refer to the remarks of *Heath, J.*, in *Mure v. Kaye*, 4 Taunt. 43. If Anderson had remained in the state of Missouri, and the facts adduced were unquestioned, there is no doubt he would have been punished by that state for the act he has done. In order to escape that punishment, he has fled to Canada. The question therefore arises, whether Canada or whether Great Britain is bound by any treaty or other international obligation, to surrender him to that state for punishment? If all nations had the same ideas of crimes and punishments, there would be no difficulty in surrendering fugitives from justice. But what one state may brand as a

crime, another may brand as a virtue—what one may call a just and impartial trial, another may stigmatize as a cruel mockery. Thus it is that a treaty or compact becomes necessary between sovereign powers for the rendition of fugitives from crime. Between Great Britain and the United States of America we have the Ashburton treaty, and the question whether Anderson ought or ought not to be surrendered to Missouri, is purely one of law, determinable under that treaty and the Canadian statute passed to give it effect. I take it that our first duty is to see our laws properly administered, our statutes properly construed, and not to be carried away by our hatred of slavery so as to commit an act which we might think righteous, but which would be a violation of our laws. We have a compact between Great Britain and the United States of America. It is a contract between two sovereign states. We must construe it as we would any other contract. It is not restricted to the subjects or citizens of either power. It is not stipulated that either power shall give up to the other only subjects or citizens, but all persons charged with the commission of the crimes enumerated. It is perfectly true that in the southern states of the Union, slaves have not the rights of citizens; but it is one thing to consider the rights of a citizen in a state, and another to consider the liability to punishment for crime of all persons within its jurisdiction. Are citizens the only persons in Missouri who can commit crimes there? Was not Anderson, though a slave, capable of committing crime in that state? We have the law of Missouri which declares that a slave doing as he did, shall be guilty of murder, and we have the laws of other states referred to by the counsel for the prisoner to the effect that when a slave suffers death for capital crime, his master shall be compensated by the state. The distinction between the rights of a citizen and responsibility of persons for crime must be steadily borne in mind in the discussion of this case, and it is clear that slaves in the southern states of America, though not in the enjoyment of the rights of citizens, are responsible for criminal acts in the same manner as their more favoured fellow men of white complexion.

As to the 2nd point, on questions of international law, there is a well understood distinction between the *lex loci* and *lex fori*. In order to obtain a proper understanding of the crime, it is necessary to look to the laws of the place where the act was done. But in order to investigate facts to see if the crime charged is made out, our legal tribunals are not bound to alter their machinery for the administration of justice, or to depart from well understood rules regulating their mode of procedure.

The Ashburton treaty observes this distinction, and seems to declare it in express language. It stipulates that each of the contracting powers shall, upon mutual requisition, &c., deliver up to justice all persons who being charged with the crime of murder, &c., but expressly provides that "this shall only be done upon *such evidence* of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed, &c. The counsel for the prisoner endeavors to give to this proviso a more extended operation than it seems to warrant. They argue that unless the act done is a crime as well according to the laws of Canada as of the foreign state that it is not a crime within the meaning of the treaty. They in fact contend that the framers of the treaty instead of observing the distinction between the *lex loci* and *lex fori* have purposely jumbled both in a manner which we think would render the treaty in most cases of crime quite inoperative. There is no authority for the position they take. The only authority that can be found militates against their position. Questions of international law are of frequent occurrence in the United States of America. Each state is for many purposes a sovereign power, and between states there is in most cases as much formality in the rendition of fugitives from justice, as between sovereign states in Europe.

By article four of the constitution of the United States, it is provided, "That a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up."

By the law of California certain frauds are made statutable larcenies. A resident of California committed one of these frauds and fled to New Jersey; his surrender was demanded; it was resisted on the alleged ground that the crimes intended by the article of the constitution must be common to both states, and that as New Jersey had no such statute as California, she was not bound to surrender the fugitive. The court held that as the crime was committed in California, and was declared to be a crime by the laws of that state, it was not necessary that it should also constitute a crime according to the laws of New Jersey, and so ordered the fugitive to be surrendered. (In re. Fetter, 3 Zabriskie 311-321.)

As to the 3rd point, bailiffs, constables, &c., are under the peculiar protection of the law. To kill one when in the discharge of duty, is an outrage committed against the law of the state, and is murder. This protection is not restricted to bailiffs, constables and persons actually employed and paid as such. It extends, under limitations, to private persons in the discharge of a quasi police duty cast upon them by law. (1 Russ. Cr. 535.) This is a law common both to Great Britain and the United States of America. By the law of Missouri it is made the duty of the inhabitants of that state to apprehend runaway slaves. Anderson was a runaway slave, and was apprehended by Diggs, an inhabitant of that state, whose duty it was under the laws of that state to make the arrest. While in the performance of this duty Diggs was stabbed by Anderson, and in consequence of the wound then received Diggs died. His death, under these circumstances was murder, and Anderson was his murderer. Anderson inflicted the fatal wound in resistance of lawful authority, and according to the laws of Missouri was a murderer. To kill in resisting lawful authority is murder in Canada as well as in Missouri. So far, if necessary to go that length, it may be argued that the crime charged is one common to both countries.

As to the 4th point, but it is said the law of Missouri is in furtherance of slavery, and we cannot for any purpose look at it so. This is a position not sustained by authority even in

England. It is one thing to be bound by a law of slavery so as to be compelled to restore a slave to his master, and it is another to look incidentally at a foreign slave law for the purpose of determining a crime according to the laws of the foreign state. There are cases in England, and modern cases too, where England has not only looked at the law of slavery as existing in foreign states, but in her own courts, and even as against her own subjects, has given effect to the slave law. I refer to *Modrazo v. Willes*, 3 B. & Al. 353; *Diana (Berthe)*, 1 Dodson's Admr. cases 95; *Le Louis*, 2 Dod. 210; *Buron v. Denman*, 2 Ex. 167.

As to the 5th point, what right have we under the treaty to sit in judgment on the laws of Missouri? What would be the effect of allowing each country to sit in judgment on the laws of the other? Is there anything in the circumstances of the two countries to lead us to believe that the contracting parties intended only crimes common to both countries? Slavery was in existence at the time the treaty was signed, but nothing is contained in the treaty to show either that slaves are to be exempted from its operation, or that slave laws are to be excluded from its operation. When the treaty was signed, each of the high contracting parties knew that the other was a sovereign legislative power, and that the laws of each country were widely different from those of the other. Indeed it was known that so far as the United States were concerned, that the law in each state in many respects differed from the laws of all other states; and yet so late as 1849, our legislature recognized the right of any of the states to demand the surrender of a fugitive from justice, (12 Vic. ch. 19, Consol. Stat. Canada, ch. 89, sec. 1.)

It cannot be said that the treaty is framed on the supposition that the laws of the two countries are identical. Such a supposition would be not only absurd, but if entertained in practice would defeat the object of the treaty by rendering it impossible to make use of it. In Upper Canada municipal corporations have power to pass by-laws for certain purposes, with power to fine and imprison. In the state of Missouri, let us suppose, for the sake of argument, there are no such by-laws. An inhabitant of Upper Canada is appre-

hended for violating the provisions of one of these by-laws. He kills the gaoler and escapes to Missouri. Are we to be told in answer to a claim for his surrender, that because in Missouri there is no such by-law he is not a murderer, and cannot be surrendered? The same question might be asked in respect of the game laws of England and of many other police laws both of England and of Canada. It was never intended by the treaty that the propriety of any one of these laws should be submitted to the decision of a foreign power. Each power accepted the law of the other country without enquiry for the purposes of the treaty, or else the treaty is a dead letter. In each country, to kill when in legal custody is murder. What each country has to ascertain in such case, is the fact of legal custody in the other at the time of the killing. To go further would be to put an end to the treaty from the first moment of its existence, and to declare that each of the contracting parties designed no more than to write upon paper that which would be absurd in theory, and impossible in practice.

As to the 6th point, this view is strengthened by a reference to the authority of magistrates in either country under the treaty. The duty of the magistrate is not to try and determine but to hear and consider. It is not to sit in judgment, but ministerially to investigate, in order that another tribunal may, if necessary, try and determine. The treaty reads: "And the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint, &c., to issue a warrant for the apprehension of the fugitive, *i. e.*, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered, and if on such hearing the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive." No trial takes place here. All that the magistrate is to do is to investigate in order to decide if there be evidence sufficient to put the party upon his trial. The trial must take place in the foreign country. By sec. 3 of Consol. Stat. of Can-

ada, ch. 89, it is provided: "The Governor, upon a requisition, &c., may by warrant, order the person so committed to be delivered to the person or persons authorized to receive such person in the name and on behalf of the said United States, or of any of such states, *to be tried for the crime for which such person stands accused*, &c. The duty of our magistrate is ministerial, and no more. That of the United States court where the offence, if any, was committed is judicial. For the purposes of the treaty our magistrates bear the same relation to the courts of the United States that our magistrates do to our superior courts of law in ordinary indictable offences. The magistrate commits for trial, and the superior courts are to determine.

As to the 7th point, the magistrate who commits for trial in a superior court gives himself no concern as to whether the trial in that court will be fair or unfair, just or unjust. It is no part of his duty to do so. So when we determine to surrender a fugitive from justice to the authorities of the United States, or of any state, for trial, it is not for us to consider whether he is likely or not to receive a fair trial there. That consideration should not in any manner influence our judgment in the performance of the duty cast upon us by the treaty and the statutes passed to give it effect. The contracting parties have not any more than the legislature intended that it should, and to allow the judgment to be influenced by such considerations would be to violate the terms of the treaty itself. So as slaves are not exempted from the operation of the treaty, to allow the consideration that Anderson, even if acquitted, will be restored to a state of bondage to influence our judgment, would be to violate our duty, and to contract for the two governments in a manner about which they did not themselves deem it necessary to contract, or to legislate for the province of Canada instead of administering the laws as we find them.

As to the 8th point. But put slavery out of the question, in what position would the case stand if Anderson, a white man had been arrested in this country by a person having no authority to do so? Our law allows force to be repelled by force, but we have no law which allows a greater force to be allowed in

defence of liberty than of life. Diggs was a slight man. Anderson is a heavy man. Diggs had a paw-paw stick or light cane in his hand. Anderson had a dirk or knife. Anderson stabbed Diggs. In doing so, considering the relative strength of the parties and the mode in which they were armed, he used more force than was necessary to effect his object—liberty. Besides, not satisfied with having stabbed Diggs in the breast, he appears to have pursued him, and when prostrate on the ground again to have stabbed him in the back. This also seems to have been an unjustifiable act. The killing was *prima facie* murder. It is for a jury alone to determine upon view of all the surrounding circumstances whether the killing can be reduced to manslaughter. It is the duty of the magistrate to commit for trial, and for the jury to consider the extenuating circumstances, so as if possible to convict only on the lesser offence.

It is, however, objected that Anderson is entitled to his discharge for at least two reasons: first—because the charge was not first laid in the United States, and secondly, because the warrant and commitment is defective.

As to the first, the word "charged," as used in the treaty, means no more than "accused." These words are in the English act, 6 & 7 Vic., ch 76, and our Consolidated Statute ch. 89, uses them as synonymous terms. I refer more especially to secs. 1 & 3 of the English act, and to secs. 1 & 3, of our act. When our act speaks of the charge as a formal information under oath, and as such distinguished from accusation, it provides that the charge may be made in Canada in the first instance. Thus, upon complaint made under oath or affirmation, charging any person found within the limits of the province with having committed within the jurisdiction of the United States of America, or any of such states, any of the crimes, &c. (sec. 1). S. 2 of the same act provides for cases where the complaint may have been first laid in the United States, but does not declare that in all cases the complaint shall be first laid there. In some cases it might be very inconvenient to do so, as where a murder is committed in the United States, on the confines between that country and Canada, the murderer is pursued with "red

hands," if no arrest could under such circumstances be effected until the charge was first laid under oath in the United States the escape of the murderer, instead of his apprehension, would be certain.

As to the second, it is contended that the warrant of commitment is defective, because it does not in words charge the crime of murder, and because the prisoner is committed until discharged by due course of law, and not in the language of the act, until surrendered or discharged, according to law. It is not necessary to have the same technical precision in a warrant as in an indictment. I admit that in an indictment the word "murder" must be used, but submit that the words "maliciously and feloniously did stab and kill," where the depositions are before the court showing the crime intended, is sufficient. (Rex. v. Marks, 3 East 157.) The authority cited for the second objection to the warrant, is *Ex parte Besset*, 6 Q. B. 481. It is true that in that case where a prisoner was committed "until discharged by due course of law," the Court of Queen's Bench refused of its own authority to remand the prisoner. But that case was decided under the English statute 6 & 7 Vic., ch 75, between which and our act, ch. 89, there is a marked difference; the English act reads simply, "there remain until delivered pursuant to requisition." Our act reads, "there to remain until such surrender be made, or until such person be discharged according to law." In *Ex parte Besset* there were no depositions of any kind before the court, but here all the depositions are before the court under writ of *certiorari*, and on the authority of *Rex. v. Marks* the court is bound to look at them to ascertain the nature of the charge. Besides, the court there refused to remand of its own authority, conceiving that it had not the power. The English act gives jurisdiction only to justices of the peace, while our act gives jurisdiction as well to any of the judges of any of Her Majesty's superior courts in the province. Here we have the fact that the prisoner was remanded, and remanded by our court of Queen's Bench, under a warrant sufficient in form. The prisoner is not merely in custody under the warrant of the justices of the peace, but of our Court of

Queen's Bench. Both Mr. Eccles and myself feel very much pressed with these objections to the warrant. None such were raised in the Court of Queen's Bench, but of course if any of them is good now that the prisoner urges them as a reason for his discharge, he must be discharged. The Crown has no desire unduly to press the case against the prisoner.

DRAPER, C. J.—The following objections were taken to the warrant of commitment:—that it was not issued in conformity with the statute because, 1st—it did not contain a charge of murder, but merely of felonious homicide. Whereas the treaty and our statute do not authorize a surrender, and consequently not a committal, for the purpose of surrender for any homicide not expressed to be murder.

2nd. That it was not expressed to be for the purpose of surrender, but only until the prisoner should be discharged by due course of law, whereas the statute requires both.

3rd. That the magistrates had no jurisdiction unless and until the prisoner had been charged with the crime in the foreign country where it was alleged to have been committed.

It was objected to the rule of the Court of Queen's Bench, that none of our tribunals, judges or magistrates had any inherent or original jurisdiction over crimes committed in a foreign country. That the only authority in such cases is derived from the statute passed for the carrying the treaty into effect, and by that statute, though power is given to judges and justices of the peace, it is given for certain specified purposes, and the courts, of which the judges may be members, are not empowered to do any one of the acts to effectuate the objects of the treaty.

During the argument it was further suggested that the statute makes the decision of the judge or justice of the peace upon the sufficiency of the evidence to require or justify the committal of the prisoner conclusive, so far as that it cannot be reviewed by any other judge or court, though not necessarily conclusive on the government, whose duty it will still be to decide upon a review of all the circumstances whether they will surrender the prisoner.

As to the matters appearing on the return to the *certiorari*, the objections may be classed under two general heads :

1st. The insufficiency of the evidence to establish a case of murder.

2nd. That enough appears to show that according to the laws of the province the prisoner had not committed murder.

Upon the face of the warrant, and of the rule of the Court of Queen's Bench, it sufficiently appears that there is no jurisdiction in the province to try the prisoner upon the charge stated. But for the treaty and our statute the proceedings, both before and since the commitment by the magistrate, would be *coram non judice*, and upon the *habeas corpus* the prisoner would be entitled to his discharge.

No power or authority therefore arises in such a case, or can be implied from the jurisdiction over crimes committed against our own laws. Whatever right any court judge or other magistrate has to deal with the matter, is given by the statute, it does not exist otherwise.

The first section of our act, (passed in May, 1849, Consol., Statutes of Canada, ch. 89,) reads thus—"Upon complaint made under oath or affirmation, charging any person found within the limits of this province, with having committed within the jurisdiction of the United States of America, or of any of such states, any of the crimes enumerated or provided for by the said treaty, any of the judges of any of her Majesty's superior courts in this province, or any of her Majesty's justices of the peace in the same, may issue his warrant for the apprehension of the person so charged, that he may be brought before such judge, or such justice of the peace, to the end that the evidence of criminality may be heard and considered ; and if on such hearing the evidence be deemed sufficient by him to sustain the charge according to the laws of this province, if the offence alleged had been committed herein, he shall certify the same, together with a copy of all the testimony taken before him to the Governor, that a warrant may issue upon the requisition of the proper authorities of the said United States, or any of such states, for the surrender of such

person according to the stipulation of the said treaty, and the said judge, or the said justice of the peace, shall issue his warrant for the commitment of the person so charged, to the proper gaol, there to remain until such surrender be made or until such person be discharged according to law."

It is plain from this section that the proceedings for the arrest of a party with a view to his surrender may be commenced in this province, and the party so charged, *i. e.*, upon complaint made before any judge or justice of the peace, may be committed to remain in prison until such surrender be made. The third objection to the warrant appears, therefore, to want foundation.

The crimes specified in the treaty are murder, or assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper. There is no jurisdiction to take a complaint, to issue a warrant for apprehension, to hear and consider the evidence of criminality, or to commit except for one of these offences.

The warrant of commitment states that the prisoner is charged for that he did wilfully, maliciously and feloniously stab and kill one Seneca T. P. Diggs. Does this charge an offence within the act?

This would be an insufficient statement in an indictment for murder in any of our courts, because it is equally indispensable to use the artificial term "murder," as it is to state that the offence was committed "*of malice aforethought*." So much so, that by the omission of either one or the other the accused would be liable to no more than a conviction for manslaughter. But for the word "*kill*" this warrant would rather charge a malicious stabbing than any other felony, while that same word "*kill*" excludes the possibility of treating the warrant as founded on a charge of assault with intent to murder. It is true that in a warrant the same particularity is not requisite as in an indictment, and it is said in effect (2 Hale. 122) it need only contain the especial nature of the felony briefly, as "for felony for the death of J. S., and the reason is because it may appear to the judges of the King's Bench upon *habeas corpus* whether it be felony or not." But this rule, and the reason for it, do not in my

humble judgment govern a case like the present where the jurisdiction does not extend to all felonies, nor even to all felonious homicides, but is on the contrary limited to one kind of homicide, expressed by its technical name "*murder*." In the execution of a statutory power thus limited, the words of the statute should, I think, be adhered to, in order that, to adopt the language above quoted, it may appear to the judges upon *habeas corpus* whether the offence charged be within the statute or no.

In my opinion therefore this warrant is defective in not stating that the prisoner was charged with murder.

The next objection to the warrant of commitment, is the omission in the conclusion to direct that the prisoner shall remain in gaol until his surrender upon the requisition of the proper authorities, or until he should be discharged according to law.

It is laid down as a general rule, deducible from and confirmed by numerous authorities, that where a man is committed for any crime either at common law, or created by act of parliament, for which he is punishable by indictment, then he is to be committed till discharged by due course of law. But where the committal is in pursuance of a special authority, the terms of the commitment must be special and must exactly pursue that authority. *Mash's case*, 2 W. Bl. 805; *Yoxley's case*, 1 Salk. 351; *Bracy's case*, 1 L. Ray, 99; *Hollinshead's case*, 1 Salk, 351; *Baldwin v. Blackmore*, 1 Bur. 602; *R. v. Brown*, 8 T. R. 26; *R. v. Remnant*, 5 T. R. 169, *Same case*, 2 Leach 583; *R. v. York*, 5 Burr. 2684; *Miller's case*, 2 W. Bl. 881.

The case most resembling the present as to this point, is that of *Ex parte Besset*, (6 Q. B. 481,) which I had not seen when I granted this writ of *habeas corpus*. My attention was first drawn to it by the learned Chief Justice of the Queen's Bench, as a case which was not under the notice of that court on the application to them for the prisoner's discharge, nor in fact was the point now raised at all under their consideration.

It appears by that case that one Besset was brought up on a *habeas corpus*, and the return showed that he was com-

mitted by a warrant from the Lord Mayor of London, under the authority of the British statute, 6 & 7 Vict., ch. 75, which was passed to give effect to a convention between Great Britain and France, closely resembling that between Great Britain and the United States. The objection taken to the commitment was that it concluded, "and him safely keep until he shall be discharged by due course of law." The authority given by the act was "to commit the person so accused to gaol, there to remain until delivered pursuant to such requisition as aforesaid." The court held the objection fatal, and discharged the prisoner.

Our statute directs that the judge or justice of the peace "shall issue his warrant for the commitment of the prisoner so charged to the proper gaol, there to remain until such surrender be made, or until such person be discharged by due course of law." Unless it can be held that the latter words include, or are equivalent to the former, this cannot be distinguished from that of *Ex parte Besset*. But we are bound to give effect to every word in the act, and it is too obvious to require argument that the legislature meant to provide for the surrender of the prisoner, and for his discharge if his surrender was not duly required; with that view they made the double provision, one part of which has been overlooked and omitted in the warrant. I consider the warrant of commitment defective on this ground also.

The rule of the Court of Queen's Bench, however, which is returned to us, as one of the causes of the prisoner's detention, is free from every objection of this character, and if the court had authority to make such a rule, affords a complete answer to this application for the prisoner's discharge, unless upon the broader questions raised which involve the discussion of principles of the highest character. But this rule is objected to as being beyond the power of the court, and I enter somewhat unwillingly upon its consideration. We are in effect called upon to review and to supersede the action of a court of co-ordinate jurisdiction and not in an appellate, but in our ordinary character. But we have no alternative, for the prisoner has a right on this application to the benefit of our opinion of it should be in his favour.

There can be no doubt as to the authority of the court when a prisoner charged with felony is brought before them on *habeas corpus*, to look not merely at the commitment but also at the depositions, before they either bail or discharge him, in order to see whether there is sufficient evidence to detain him in custody, and it is said in *R. v. Horner*, (1. Leach 270). "The court in such a case never form a judgment whether the facts amount to felony or not, but merely whether enough is charged to justify the detainer of the prisoner and put him on his trial."

The law is thus stated in *R. v. Marks*, (3 East. 151,) "Though the warrant of commitment be informal, yet, if upon the depositions returned, the court see that a felony has been committed, and that there is a reasonable ground of charge against the prisoners, they will not bail, but remand them. The same rule applies with respect both to the law and the fact: unless we see reason to doubt the truth of the fact charged, the prisoner must be remanded, and the same consequence follows unless we see reason to doubt whether the fact charged constitute any offence within the law." The same principle is affirmed in *Ex parte Page*, (1 B. & A. 568,) and in *R. v. Gordon*, (1 B. & A. 524,) and an analogous course was followed in *R. v. Richards*, (5 Q. B. 926,) in *Ex parte Cross*, (2 H. & N. 354,) and *In re Smith*, (3 H. & N. 227.)

These authorities, to which it would be easy to add many others, conclusively shew that the course followed by the Court of Queen's Bench is warranted by principle and authority whenever the case is one within their ordinary jurisdiction.

The effect of the rule in question is either merely to remand the prisoner on the magistrates warrant, or to commit him by the authority of the court alone.

After a long and most anxious consideration I have formed the opinion that the rule is not sustainable in either view. I have already given my reasons for thinking the warrant defective, and if the prisoner be remanded exclusively on that, he should be discharged. The rule does not profess to amend the warrant, and therefore the imprisonment rests on the inherent authority of the court alone.

This point merits full examination. We have the advantage of the decision already mentioned in the case of *Ex parte Besset*, (6 Q. B. 481, 9 Jurist 66,) which, as I have remarked, was not adverted to by any one concerned in this matter until after the writ on which the prisoner is now before us was issued.

The British statute, 6 & 7 Vict., ch. 75, (to which I have before referred,) upon a requisition from the French Sovereign within the terms of the convention, authorizes either of the Provincial Secretaries of State, and some other high functionaries, by warrant to signify that such requisition had been made, and "thereupon it shall be lawful for any justice of the peace or other person having power to commit for trial persons accused of crimes against the laws of that part of her Majesty's dominions in which such supposed offender shall be found, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as according to the laws of that part of her Majesty's dominions would justify the apprehension and committal for trial of the person so accused, if the crime of which he or she shall be so accused had been there committed, it shall be lawful for such justice of the peace or other person having power to commit, as aforesaid, to issue his warrant for the apprehension of such person, and also to commit the person so accused to gaol, there to remain until delivered pursuant to such requisition as aforesaid."

Upon this statute Besset was committed, and in endeavoring to sustain the commitment, counsel suggested that the court would look into the depositions on which the warrant was granted, and if they shewed a crime had been committed, would remand the prisoner. To which *Wightman, J.*, replied, "that could only be where a crime appeared for which trial might be in this country." Lord *Denman* said, "the depositions are nothing to us unless under the statute;" and *Coleridge, J.*, asked "does the statute give any power of this kind to us?" And in giving judgment to discharge the prisoner, Lord *Denman*, according to the report in the *Jurist*, said "neither this court nor the gaoler in whose custody the prisoner is brought before us, have any power over

that individual except what is given by the recent act of parliament, and the warrant of commitment has been drawn up in such a manner as to deprive these parties of any power to detain him. The court has been requested to remand the prisoner because it is alleged that he has been guilty of some crime, but the court knows nothing of any crime except from what appears on the face of the warrant of commitment, and that is insufficient to justify the detention of the prisoner." And in 6 Q. B., his lordship is reported to have said, "we are asked to remand the prisoner on our own authority as charged with such a crime, but we know nothing of the crime unless as it is brought before us by the warrant, or I should rather say *we have no authority of the kind in such a case*. If we could have acted in the manner suggested, the statute would have been unnecessary."

Unless there be a difference between the British act and our own sufficient to create a solid distinction, this case is, in my opinion, decisive. And I perceive no difference worthy of notice except that in the British statute justices of the peace, and other persons having power to commit for trial persons accused for crime, are empowered to take the proceedings pointed out against the supposed offender, while in our own act any judge of any of the superior courts in this province or any justice of the peace within the same may do so. It cannot, I think, be successfully contended that these words confer any new power on the superior courts, though they do so expressly on the individual judges, and in my opinion the general ordinary powers of the courts cannot be extended by implication to cases arising under our statute, any more than the corresponding powers of the court of Queen's Bench in England could be so extended under the British act.

It is true, it does not appear in *Ex parte Besset* that the depositions were before the court. I infer they were not; but nevertheless, the language used by the judges clearly expresses to my mind their opinion that they had no authority to look at them for the purpose of supplying any defect in the warrant.

The result is that in my opinion the return to the writ of

habeas corpus shows no sufficient ground for the prisoner's detention. He ought, therefore, to be discharged; and whatever conclusion I might arrive at on the more general grounds urged on his behalf the result must be the same.

I have, so far as the limited time, and the pressure of other business during this week would permit, considered some of the questions involved. I have at least been able to appreciate the difficulty of disposing of them.

One doubt arises on the very threshold, namely, whether the statute gives the court power to look into the depositions, and to adjudge whether they contain evidence of criminality sufficient to sustain the charge of murder. It is easy to suggest objections to the placing the power of exclusive and final adjudication on this point in the hands of a single justice, even although his decision is not binding on the government, to whom he must certify the same and the evidence, and on whom rests the ultimate responsibility of surrendering or refusing to surrender the prisoner. Still, however weighty I may deem such objections, if the statute does confer that jurisdiction on a single judge or justice of the peace, the statute must be obeyed, and I am free to confess that there is some difficulty in affirming that this court can review the decision of the judge or justice, without running counter to the opinions expressed in *Ex parte Besset*.

But conceding that we have that power, and as a necessary incident to it, to bring the depositions before us by *certiorari*, (as to which some technical objections may be suggested,) I require further time before I can adopt as a principle of our law, that because a man is a slave in a country where slavery is legalized, he is legally incapable of committing a crime—that he is not to be deemed a “*person*” who may be charged with an offence. Nor am I prepared to decide, that on a charge of murder, sufficiently sustained by evidence to warrant his being committed for trial according to our law, the person accused of that crime would not be within the meaning of the treaty, because, if acquitted on a trial in the country where the accusation arose, he would be detained in bondage as a slave, or because it might

be feared, and even with reason feared, that because he was a slave he would not be treated in the same spirit of justice and impartiality as a freeman before the tribunals of a foreign state where slavery is established by local law. Or to take a possible case to arise in a free state, let it be supposed that a slave flies from a slave state into a free state, whose laws, nevertheless, unlike our own more happy institutions, sanction and require his surrender merely as a slave; that the fugitive kills an officer of the free state, who is endeavoring under regular process to arrest and detain him with a view to his surrender, and having killed the officer, escapes into this province, I do not yet see my way to the conclusion that we could hold the case not to be within the treaty, and the act so clearly not to be murder, that there would be nothing for a jury, but that the court could dispose of it as a pure question of law. For if there be a question of fact to be tried; I apprehend he must be surrendered, as such question could only be tried in the country where the fact arose.

These and other similar questions are of too serious a character to be decided upon impulse or in haste, and I do not scruple to say that so long as the prisoner sustains no prejudice by the delay, I desire to defer pronouncing an opinion upon them; I am reluctant on the one hand, where the occasion does not make it indispensable, to declare that each individual of the assumed number of 4,000,000 of slaves in the southern states may commit assassination in aid of escape on any part of his route to this province, and find impunity and shelter on his arrival here; I am reluctant on the other hand to admit that Great Britain has entered into treaty obligations to surrender a fugitive slave, who, as his sole means of obtaining liberty, has shed the blood of the merciless task-master who held him in bondage. An occasion may arise when it will be my duty to adjudge one way or the other. But that necessity does not exist at present, and I am not afraid to avow that I rejoice at it. I am, however, glad that the discussion has taken place; that the doubts and difficulties it suggests have been brought prominently forward. The power of dealing with them is

in the hands of others and the necessity of dealing with them must, I think, be felt by those who possess the power.

RICHARDS, J.—It seems to be generally conceded that unless there are treaty stipulations to that effect, one nation is not bound to deliver to another fugitives from justice seeking refuge in the territories of such power.

Mr. Justice *Story* in his *Conflict of Laws*, 4th ed., sec. 628, states that Lord *Coke* expressly maintains that the Sovereign is not bound to surrender up fugitive criminals from other countries who have sought a shelter in his dominions.

Mr. *Phillmore* in his recent very elaborate work (vol. 1, p. 411), on *International Law*, observes, "France, Russia, England and the North American United States, have constantly, either by diplomatic acts or decisions of their tribunals, expressed their opinion that upon the principles of *International Law*, irrespective of treaty, the surrender of a foreign criminal cannot be demanded;" he adds, "The result of the whole consideration of this subject is that the extradition of criminals is a matter of comity, not of right, except in cases of special convention."

I apprehend there can be no doubt that if it were not for the treaty, and the act of parliament carrying it out, we would be obliged to discharge the prisoner from custody, although it was clearly shewn that he had committed murder in the state of Missouri; if it does not appear that he has committed some offence against the Queen's peace, we have no right to detain him in custody, except under the authority of the act of parliament.

We must look then to the statute to see if this prisoner is charged with any offence under it, and if he has been committed according to its terms. It is objected that the statute requires that the prisoner should be charged with *murder*, and that he should be committed to the gaol, there to remain until he is surrendered, whereas the words used in the *mitimus* only imply a charge of manslaughter, and by the warrant he stands committed until delivered by due course of law.

There is no doubt that if the offence charged is not mur-

der, then the prisoner must be discharged, and it is equally certain that the statute prescribes, that if the magistrate deemed the evidence sufficient to sustain the charge, he ought amongst other things, to have committed the prisoner to the proper gaol, there to remain until he was surrendered, or until he was discharged according to law. The words of the warrant, which states the charge as to the prisoner, are, that he did, in Howard county, in the state of Missouri, on the 28th September, 1853, "wilfully, maliciously, and feloniously stab and kill one Seneca T. P. Diggs." If these words were the only ones by which a charge of murder was laid in an indictment, it would be clearly bad, as well on account of the omission of the allegation that the action was done of malice aforethought, as of the further omission of the allegation that prisoner had *murdered* the said Diggs.

In Russell on Crimes it is stated, at p. 563, vol. 1, "It is necessary to state that the act by which the death was occasioned was done feloniously, and especially that it was done of *malice aforethought*, which is the greatest characteristic of the crime of murder, and it must also be stated that the prisoner *murdered* the deceased."

It is still necessary under our own statute (Con. Stat. of Can., 22 Vic., ch. 99, sec. 23) in an indictment for murder, to state that "the prisoner did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased."

It is not, however, as a general rule imperative in a warrant of commitment to charge the offence with the same certainty as in an indictment, and where it sufficiently appears from the warrant and depositions that a felony has been committed, the court, though the warrant be defective, if the offence be one committed against the Queen's peace, will recommit the prisoner under a warrant of their own; but in these cases a felony must be clearly shewn to have been committed, if that is not the case the prisoner will be entitled to be bailed or discharged.

Now here, so far as the right to arrest the prisoner is concerned, it ought clearly to appear that he is charged with *murder*, for if charged with a lesser offence, though that be a felony which is not within the treaty, he cannot be detained.

If the charge is not clearly one of murder, and it is doubtful if manslaughter or murder is charged, then I take it the general rule must prevail that that interpretation must be given which is most in favour of the liberty of the accused.

If it had been charged against the prisoner that he did wilfully and feloniously stab and kill Seneca T.P. Diggs, this would only be a charge of manslaughter, and the prisoner without doubt would be discharged. Does then the introducing the word *maliciously* into the charge show that the prisoner is charged with the crime of murder. Two essential ingredients seem still wanting to make the charge clearly that of murder, viz., that the malice should have been "afore thought;" and the killing should have been alleged to be murder. The general definition of manslaughter being "the felonious killing of another without *malice*," express or implied, it would seem that the allegation that the prisoner did *maliciously* stab and kill Diggs, would afford a strong argument that the charge was not one of manslaughter; but the omission to charge the malice as *aforethought*, may in the same way be urged to support the proposition that the charge is not for murder, which it ought to be to justify the prisoner's detention.

As this proceeding is one taken under the statute, it can only be sustained so far as it is in accordance with the act. The treaty which the statute carries out refers to persons charged with the crime of murder, not manslaughter, and these are to be surrendered. The offence charged ought to be plainly stated: there would be no difficulty in stating that the prisoner had been charged with murder if the magistrate intended that he should be surrendered for that crime: the charge is not so made, and if the language in which it is stated differs from the treaty, it ought to be clear and explicit so as to be beyond all doubt. The words of *Ashhurst, J.*, in the *King v. Judd*, 2 Term Reports 256, seem to me peculiarly applicable. He says: "Whatever words the legislature used, we must suppose that they know the meaning of them, and if a justice uses the same words we are bound to suppose that he intended them in the same sense, but if he makes use of other words he must be more

precise." Here the justices have made use of other words, and they are not more precise. On this point, though not entirely free from doubt, I think the warrant bad.

As to the next objection, the omission in the commitment to direct that the prisoner should remain in gaol until the surrender should be made as required by the statute. Besset's case (6 Q. B. 481) is a strong authority in favor of the prisoner, and unless we are prepared to over-rule that case, we must consider this objection fatal. In Mash's case, 2 Sir W. Blackstone's Reports, 806, the doctrine applicable to the question as to the necessity of inserting the words until delivered by due course of law, is thus clearly laid down:

"The true distinction is, that where a man is committed for any crime either at common law or created by act of parliament for which he is punishable by indictment, there he is to be committed till discharged by due course of law; *but when it is in pursuance of a special authority, the terms of the commitment must be special, and exactly pursue that authority.*" But the omission of the words referred to, suggest to my mind a still graver difficulty, and not one of a merely technical character. There is nothing before us to shew that the magistrates, "after hearing and considering the evidence of criminality," deemed the same sufficient to sustain the charge. That fact has not been certified to us, though it may have been to the Governor, and the statute says distinctly that *if on the hearing the evidence be deemed sufficient by him* (the magistrate) *to sustain the charge*, he shall, in addition to certifying the same, &c., issue his warrant for the commitment of the person so charged to the proper gaol, there *to remain until such surrender be made*, or until such person be discharged according to law. If they the committing justice or justices deemed the evidence sufficient to sustain the charge, the prisoner ought to have been committed for the purpose of being surrendered. If they did not declare that they had so committed him, what evidence have we that there adjudication was unfavorable to the prisoner. It may of course be urged that if they had not intended his surrender, they would have discharged him from custody. This is only a negative mode of proving that they did what

was required by proving if they had not intended to do so they ought to have done something else. In a matter of this kind we must have it clearly shewn that the magistrates did decide against the prisoner as to the evidence sustaining the charge against him. The only proper way of proving that they had so decided in this case as it is now before us, is by shewing that they had issued such a warrant as the statute requires to follow from such a decision. The warrant shewn does not do this, and the omission is in an important part of it. I cannot say that I have any doubt that the warrant is bad on this ground.

The next point for consideration is whether the order of the Court of Queen's Bench recommitting the prisoner to the custody of the gaoler of the county of Brant, until a warrant shall issue for the surrender of the prisoner to be tried in the state of Missouri for the murder of Diggs, &c., supplies the deficiencies in the former warrant, and makes his present detention lawful.

If any offence against the peace of the Queen, and triable by our laws, appeared sufficiently made out against a prisoner seeking his discharge on a *habeas corpus*, though the warrant of commitment was defective, the court in its discretion might order his detention for trial, because under those circumstances there would be no doubt of their jurisdiction as a court over the offence.

But here there is no jurisdiction given to the court as such to commit the prisoner to be surrendered. That must be done by the justice or judge who may have heard and considered the evidence of criminality. Any one of the judges of the superior courts undoubtedly has power under the statute to issue a warrant, and bring the party accused before him, and to consider the evidence of criminality in the same way as a justice of the peace. But this power is only bestowed on the judges individually—it is not given to the court as such. It is more like the power formerly given under our municipal acts to a judge in Chambers to try the validity of an election on proceeding by *quo warranto*; there the court could not in the first instance have decided the question which the single judge was called upon to dis-

pose of. It is true, the decision of the judge might, under the statute, be reviewed in the full court, but that did not give the court power to decide in the first instance, but only to review as provided by law. In the present state of the municipal act, the jurisdiction is given to a single judge, and I have never heard it urged that in case of a defective adjudication by a judge, the court could interfere to put it right.

Having arrived at the conclusion that the prisoner is entitled to his discharge on the objections taken to the form of the warrant, I do not think we ought to detain him in custody until the court are prepared to decide the other questions raised upon the argument which we are not in a position to do at present.

If we should finally concur in opinion with the majority of the Court of Queen's Bench, as to these questions, we would still be bound to discharge the prisoner on the objections raised on his behalf to the warrant, and if we differed from them the prisoner would of course be set at liberty. Being therefore entitled to his discharge, we ought not to delay it unnecessarily.

Under ordinary circumstances, if we were prepared to decide the main question, we might express our opinions on it, though we had determined to discharge him on the objections to the warrant, in order that those who might be called upon hereafter to act in similar cases, might know what views the court entertained on the subject.

It is probable that a similar question will not come up again very soon, and in the meantime circumstances may occur, and such changes take place, that for practical purposes our judgment would be useless; and having, as already intimated, come to the conclusion that the prisoner is entitled to his discharge on the ground mentioned, I have no doubt that it is best on the whole that we should order him to be discharged at once, rather than detain him longer in custody, or unnecessarily discuss questions and express opinions which may be of no practical advantage, and which might possibly tend to create difficulties and embarrassment.

Our judgment proceeds on the ground that the prisoner

is detained under the treaty and act of parliament, and in accordance with the views of the Court of Queen's Bench in England expressed in Bessett's case. It was not contended before us, if it would have been of any use so to contend, (which at present I am far from supposing would have been the case), that at common law, and by the comity of nations, the prisoner might be detained by the order of the Crown to be surrendered as a fugitive from justice. Even if that view could be sustained, it does not appear that there is any such order for his detention.

The other formal objections to the proceedings taken on the argument are disposed of by the judgment of his lordship, the Chief Justice.

HAGARTY, J.—I am of opinion that our provincial statute allows the proceedings to be commenced by the complaint on oath before the justice of the peace, without proof of a charge pending in the foreign state.

Whatever may be our view of the offence apparent in the depositions, I think we are bound to see if the prisoner be detained on a charge which the statutable authority, the examining justice, has deemed sufficiently sustained as to some one of the crimes mentioned in the extradition treaty, and if it do not appear that such (*quasi*) adjudication has been clearly made by such authority, I do not understand that either of the superior courts can assume the task of examining the depositions, and judge them sufficient to sustain the charge. That duty I think is cast elsewhere, and must be performed by the committing justice. He is to be satisfied that one of the statutable offences is made out, and he must certify the result at which he has arrived. It is not that the court may think his materials warranted his arriving thereat, or that he should have done so. He must do so himself, and we cannot, I think, do it for him. He must declare in unequivocal language that a charge (for example) of murder is made out. The statute directs him to certify his finding, with a copy of the testimony to the Governor, and I presume it then rests with the Queen's Government on a view of the case to assume the responsibility of further action.

In the absence of a positive finding by the justice, as to the sufficiency of the evidence to sustain one of the statutable offences, I am of opinion that the whole case fails, and that no legal authority exists to correct or supply the defect.

In this case the only evidence before us of any such finding is the warrant. The charge there expressed is that the prisoner in a foreign country "wilfully, maliciously, and feloniously stabbed and killed Diggs." Does this clearly declare a crime under the extradition treaty, viz., murder? I am of opinion that the magistrate had no right to substitute any words of his own if he intended to commit for a well-known crime, mentioned by a well-known name in the treaty, and require us to assume that he meant the crime of murder by these expressions.

It is abundantly clear that an indictment for murder so worded would be bad, and although the introduction of the word "maliciously" would be unsuitable in an indictment for manslaughter, I do not see how that can help the case. In commitments for trial for offences in our own country, the depositions can be referred to if the warrant be defective, and if they show substantially what the crime is, the prisoner can be still detained. The case cited of *Rex v. Marks*, and subsequent authorities amply support this.—*Rex v. Remnant*, 5 T. R. 169; *Ex parte Bartlett*, 7 Jurist 649, *Wightman*, J.

It is readily conceded that a commitment need not be so certain as an indictment, but "it ought to be sufficiently certain to shew that an offence has been committed." In the ordinary case that would mean an offence cognizable by our courts, here it must distinctly shew one of the statutable crimes, and if my view be correct, we cannot seek to gather that result from the evidence, as the statute throws that duty on the committing justice.—*Rex v. Judd*, 2 T. R. 256; *Rex v. Remnant*, 5 T. R. 169.

It seems to me that from the nature of this proceeding all reasonable particularity should be required in the instrument under which the prisoner is detained, that nothing should be left to conjecture, and that the charge should be

explicit and independent of all aid from the depositions. I think we are far from insisting on mere technical exactness in requiring every person intended to be charged with *murder*, to have the crime named as such, its universal and indispensable description in indictments, and not intend against the prisoner that murder is charged by words which in an indictment could only warrant a conviction for manslaughter, if good even for that lesser crime.

If this court cannot look at the depositions to support the warrant, the necessity of a strict construction of the latter is indispensable. The warrant or authority to detain is, as it were, the indictment or legal record of the prisoner's crime, so far at least as this country is concerned.

The case of *Bessett* seems to indicate the opinion of the court that they could not look beyond the warrant. The Chief Justice has already quoted fully from that case.

It may be suggested that as to the crime of arson mentioned in the treaty, it is not necessary to use that word to describe the offence. That may be so. The word is not used as "a term of art," as murder is in legal documents, but is used to express what indictments describe as "wilfully, maliciously, and feloniously setting fire to," &c., &c. But murder is emphatically as the books called it, "a term of art," and I am not willing to dispense with its presence in a document of such overwhelming importance to this prisoner's life and liberty as this warrant necessarily is under the construction given to it, and to the courts jurisdiction over it by the case just cited. As evidence, and the only evidence before me, of a deliberate conclusion or adjudication by a proper officer, that a man living under the protection of our laws has brought himself within the grasp of a treaty for the delivery to a foreign state as a murderer. I decline accepting the words here used as legally descriptive of murder. The law describes this crime in words of universal use, of pointed and unequivocal significance. I am not to conjecture that this necessarily means murder, or to listen to arguments that such words are too strong for manslaughter, &c., &c. It is sufficient for me to say that if murder was meant, murder should have been expressed.

I consider this a thoroughly substantial objection, not a mere technicality, but as the want of an essential charge necessarily fatal to the validity of the detention.

I am also of opinion that the conclusion of the warrant is defective, although our provincial act has the alternative which the statute governing *Bessett's* case had not. The statute directs a commitment to gaol for a special purpose, viz., extradition, and not as in the common case of an indictable offence, where the legal deliverance, will surely come as a gaol delivery. I think that the commitment should have strictly pursued the words of the act, which alone gave it any authority.

I do not consider that the order of the Court of Queen's Bench affects the right of the prisoner to ask his discharge from a court of co-ordinate jurisdiction. He now stands remanded on the original warrant, not as in *Rex v. Marks*, discharged from custody on the defective warrant, and committed by the court of its original authority. If the warrant be bad everything falls with it.

Considering the prisoner entitled to his discharge on these grounds, I have not desired to prolong his detention to allow further time for deliberations on the other very grave questions raised.

Nothing would be easier than to arrive at a conclusion if I had the right to dispose of this case simply on my own ideas of right and wrong, or on the dignity and privileges of human liberty—if, in short, I could ignore my peremptory obligation to decide according to what I believe the law is, and not as I may think it ought to be. In Lord *Stowell's* words: "I must remember that in discussing this question I have to consider it not according to any private moral apprehensions of my own, (if I entertained them ever so sincerely,) but as the law considers it."

Our treaty with the United States is not very unlike those with France and other nations, and but for the unhappy presence on this continent of some millions of our fellow beings in involuntary servitude, there would be little practical difficulty in its operation. But the existence of this ill-used race presents difficulties which have hardly been duly pro-

vided for in the international contract, and a rigid adherence to some of the constructions ably pressed upon us in argument, would possibly lead to the gravest results.

To treat this class as wholly excluded from this treaty, as chattels, and not as responsible persons, is intelligible in statement, but might have this result that if (apart from any attempt at freedom) a slave murdered his fellow slave, or deliberately burn up a dwelling house with its inmates, white or coloured, or on the sea-board commit piracy, &c., and fly to Canada, he would be safe from punishment.

Again, to test a fugitive's criminality in every way as if the act charged were done on the soil where he is arrested, and to hold the crime incomplete unless every law alleged to be violated equally prevailed in both countries, might insure impunity to the mass of offenders, white and coloured. Resistance to a merely local law even to the death, in Canada, New York, or Missouri, would thus be no crime, and the logical sequence might be that the white man or the slave in custody, or under sentence for the breach of a law not in force here, might, by killing his keeper, vindicate his right to escape from what we must thus hold to be an illegal restraint.

Again, the doctrine that we must accept every foreign law, be it right or wrong, natural or unnatural in our eyes, can readily be pushed to extravagant results, as for example, if it be declared murder for the slave to slay her ravisher in defence of chastity, or resist to the death a corporal punishment dangerous to life or limb. This is also intelligible in statement, but would be revolting and unbearable in practical result.

Lastly, that the contracting parties are to surrender or refuse to surrender, according to their view of the justice or the injustice, the equity or the iniquity of the law said to have been violated. This must lead to endless disputation, and leave the treaty either to utter disuse, or to a capricious and offensive execution.

But the adoption or repudiation of these interpretations may be altogether for the consideration of the governments of the respective countries on receiving the reports of the

officers appointed by law to take the evidence against fugitive offenders. I could have wished that the arguments before us had been more directed to the question, whether it is on a return to a writ of *habeas corpus* that these constructions are to be discussed.

I concur in deciding that the prisoner is entitled to his discharge, not without a strong hope that such modifications may before long be made in the treaty as may prevent the recurrence of such cases as the present.

Per cur.—Prisoner discharged.

MCKAY V. TAIT ET AL. (HOWCUTT GARNISHER.)

Attachment—Judgment—A debt attachable before judgment—Attachable after.

Held, that the recovery of a judgment upon a debt which was attachable prior to such judgment being recovered, did not render it less attachable after such judgment recovered.

In Michaelmas Term *Sullivan* obtained a rule *nisi*, on behalf of the judgment debtor. Duncan B. Harrison calling on the judgment creditor and the garnishee to shew cause why the attaching order obtained in this matter, and the summons to shew cause why the debt attached should not be paid over, should not be set aside for irregularity.

1st. Because the claim or debt sought to be garnisheed is a verdict and not a debt. 2nd. Because the garnishee proceedings were not entered in the debt attachment book as required by the new rules, number 58, until other garnishee proceedings in another matter attaching the same debt had been entered on the said debt attachment book. 3rd. On grounds disclosed in affidavits and papers filed, and on affidavits and papers filed on a previous application in chambers in this matter.

The affidavit filed on moving the rule stated, 1st. That on 16th October, 1860, defendant Harrison obtained a verdict against the garnishee for £75. 2nd. That after said verdict and before judgment thereon, the judgment creditor on 17th October last, obtained an attachment order and garnishee summons. 3rd. That (as deponent believes) the garnishee proceeding were not entered in the debt attachment book according to the rules of court, until several weeks after the

said order and summons were issued, and 4th, that before the order was obtained by the judgment creditor, an attaching order at the suit of another party was issued to garnish the said debt, but this last mentioned order was not served until after the service of the order now in question; but 5th, that the last garnishee proceedings were entered in the debt attachment book before the proceedings in this cause. 6th, that Harrison, one of the judgment debtors, is indebted to the deponent for the costs of the suit against Howcutt, as well as for other business done for him. 7th, that Harrison sued Howcutt for money had and received, and Howcutt resisted payment on the ground that the £75 was paid on account of purchase of land, which purchase afterwards fell through in consequence of Harrison's default.

In Hilary Term *J. R. Jones* showed cause, citing *Jones v. Thompson*, 4 Jur. N. S. 338 (1 E. B. & E. 63 S. C.); *Johnson v. Diamond*, 11 Exch. 73; *Dresser v. Johns*, 5 Jur. N. S. 1262 (6 C. B. N. S. 429 S. C.); *Holmes v. Tutton*, 5 E. & B. 66; *Lockwood v. Nash*, 18 C. B. 536.

Sullivan in support of the rule cited *Sparks v. Younge*, 8 Ir. C. L. Reports 258, and *Daniel v. McCarthy*, 7 Ir. C. L. Reports, 261.

DRAPER, C. J.—Though the rule is drawn up on reading affidavits and papers filed in chambers, I do not find that any such were filed in this court on taking out the rule nisi. The first ground of objection is that the matter attached is a verdict, not a debt. As to its being a verdict, if that were given for a debt which might have been attached before any action was brought for its recovery, it will not lose its character, or be the less a subject of attachment, because a verdict has been rendered for it. It will only be a debt when judgment is recovered, though a debt of higher degree. Therefore the only question is whether this sum of £75 for which a verdict has been rendered, as money had and received, is liable to be attached as a debt, and I see no reason to doubt that it is, for the verdict affirms the existence of a debt, at the time of action brought.

As to the entry in the debt attachment book, I do not see what right the defendant Harrison has to raise the question. The garnishee will have to see that he pays the money to the proper person.

I think the rule should be discharged.

Per cur.—Rule discharged.

MACARA V. MORRISH.

Division Court—Title to land—Writ of Prohibition.

Upon an application to prevent the judge of a division court from further proceeding with a plaint therein *prima facie* proof of a title to land being given, and that such title must come in question, and no cause shewn to the contrary.

Held sufficient, and a writ of prohibition granted.

McMichael, in Trinity Term, obtained a rule returnable on the first day of Michaelmas term, calling on the judge of the county court of the county of Middlesex to shew cause why a writ of prohibition should not issue to prohibit him as such judge from further proceeding in a plaint in the ninth division court of the said county.

Notice of intention to make the application was served upon the judge, and the clerk of the court, and on the plaintiff in the division court.

The rule was granted on the affidavit of James Howard, who stated that the defendant *Morrish* was summoned to appear at the ninth division court for the county of Middlesex, on the 29th of February, 1860, and the particulars of demand annexed to the summons (copies of both being filed) were "for share of crops, &c., on the south quarter of lot No. 17, in the 5th concession of London, for the year 1859, under agreement \$100." That *Morrish* defended himself on the ground that the title of the said *Macara* to the land had determined before the accruing of the said supposed cause of action. That the judge of the division court gave judgment against *Morrish*. That *Morrish* applied for a new trial, and the learned judge granted it on condition that the defendant within ten days filed security, to the satisfaction of the judge that he would prosecute a writ of certiorari to remove the cause into the court of Queen's Bench, and pay all such costs as might be awarded against him; that such writ be sued out within twenty days and prosecuted without delay; and

that upon such writ being sued out the plaintiff might amend his claim to the full amount thereof. If such security were not filed the judgment for plaintiff to stand and execution to issue. That Morrish was unable to comply with the condition, and on the 8th of August, 1860, execution was issued against his goods. That about the 22nd of February, 1856, Macara mortgaged the premises mentioned in the particulars of demand to him, the deponent, to secure about £900, and the said Macara having made default, the deponent filed a bill to foreclose, and obtained a final order of foreclosure, dated the 14th of April, 1859. That afterwards, and before the crop was put in *viz.*, about the 17th of April, 1859, the deponent notified Morrish of the foreclosure, and that he Morrish must pay the share of the crop to deponent instead of to Macara, and in pursuance of that notice Morrish paid the share of the crop to deponent as landlord of the premises. That the agreement mentioned in the particulars of demand bore date about the 1st of November, 1858, and was intended to be a lease of said premises for one year from Macara to Morrish, and the share of the crop mentioned was the rent for the premises which Morrish promised to pay therefor to Macara.

A certificate of the registrar under the seal of the court of Chancery of foreclosure was also put in.

The rule *nisi* was served on the judge of the county court on the 11th of September, and on the plaintiff Macara on the 14th of September last, and in Michaelmas Term *McMichael* moved his rule absolute.

DRAPER, C. J.—No cause has been shewn against this application. The case seems to be a claim of rent by a mortgagor against his tenant, the defence is notice by the mortgagee of his claim to the rent, with the proof of a foreclosure. But that is eviction by title paramount in effect, and consequently discharged the tenant from the mortgagor's claim. The question of title therefore arose, and the jurisdiction of the division court was ousted. So far as the case is disclosed, and no cause being shewn to the contrary, I think we should grant the rule. If a *prima facie*

case be made, and the opposite party do not answer, the court may presume it is not intended to deny the right asserted.

See *Emery v. Barnett*, 4 C. B. N. S. 423; *Eversfield v. Newman*, 4 C. B. N. S. 418; *Hoey v. McFarlane*, 4 C. E. N. S. 718; *Recardo v. Local Board of Health*, 2 H. & N. 257; *Chew v. Holroyd*, 8 Exch. 249; *Jackson v. Beaumont*, 11 Exch. 300; *Kerkin v. Kerkin*, 3 E. & B. 399; *Marsden v. Wardla*, 3 E. & B. 695.

Per cur.—Writ granted.

BARNETT V. CAPLIN.*

Lease—Reservation in—Construction of—Pleading.

The plaintiff occupied certain premises on the bank of the river Niagara near the falls. The defendant occupied by an assignment of a lease from the Crown, premises of the same nature nearer the falls, in which lease was a condition that free access be permitted to the falls by the staircase and pathway at the foot of the rock on the defendant's premises, at all times to all persons on payment of a sum not to exceed ¹⁰⁰25. "Mr. Thomas Barnett or any assignee of the premises now occupied by him at the falls or any regularly employed guide or guides in his service while conducting any person or persons to, under or from the sheet of water to be exempt from all charges for the use of said pathway."

The defendant erected a fence across the pathway at the most northern limit of his land below the bank, and thereby shut off the plaintiff's access to the falls by means of his (plaintiff's) staircase, which was further from the falls, for which obstruction the plaintiff brought this action, claiming in his declaration a wrongful obstruction of the said staircase and pathway.

The defendant pleaded that he did not obstruct the staircase and pathway reserved for the use of the plaintiff by the letters patent.

Held, that the only right claimed in the declaration being that granted by the letters patent, which, on the pleadings, was shown not to have been obstructed, the defendant was entitled to recover.

DECLARATION. 1st count—that plaintiff was owner and occupier of a piece of land in the township of Stamford adjacent to the falls of Niagara, and as such owner and occupier entitled to a right of way from the said land over a certain close staircase and pathway to the said falls and back, for himself and his servants while regularly employed by him, and while conducting any person to, under, or from the said falls at all times of the year, and defendant wrongfully obstructed the said way.

2nd. count—that one Saul Davis being the owner and occupier of a parcel of land in the township of Stamford adja-

*NOTE.—A cross action was brought between the same parties and upon the same subject matter of dispute, which is not reported, the decision being the same as in this case.

cent to the said falls, the Queen, by letters patent under the great seal of the Province, granted to Davis for a term of years not yet expired, that parcel of land in the township of Stamford described as situate and being in front of the premises now occupied by and belonging to the said Davis, (extending from a point three feet north of the staircase, erected by Davis,) and along the top of the cliff to the said falls, and from the top of the cliff down to low water, on the following conditions: that free access be permitted to the said falls by the staircase and pathway at the foot of the rock at all times to all persons on payment of a sum not exceeding 25 cents; Mr. Thomas Barnett or any assignee of the premises now occupied by him at the said falls, or any regularly employed guide in his service while conducting any person to, from or under the sheet of water to be exempted from all charge *for the use of the said pathway*. That plaintiff is the Thomas Barnett in the said letters patent mentioned, and was owner and occupier of a certain other parcel of land in the said township, being the parcel of land in the letters patent mentioned as occupied by him, and was entitled and accustomed by himself and servants, by virtue of said letters patent, at all times of the year to conduct persons visiting the falls over the said close by the said staircase and pathway, to, under, and from the falls, to and from the land of plaintiff for certain hire paid to him by such persons in that behalf, and defendant wrongfully obstructed the staircase and pathway whereby plaintiff was deprived of his access thereto, and lost divers gains, &c.

Plea, that defendant did not obstruct the staircase or pathway reserved for the use of plaintiff by the letters patent.

The case was tried at the autumn assizes, 1860, for the county of Welland, before *McLean, J.* The plaintiff proved that he had for several years a museum a short distance north from the falls of Niagara, and had built opposite to his museum a staircase to descend the precipitous bank of the river to a pathway made along the rocks and leading to the edge of the falls. The defendant had also a staircase south of the plaintiff's, which had been constructed by Saul Davis for the same purpose as the plaintiff's, at a point nearer about 200

feet to the falls than the foot of the plaintiff's staircase, and all parties descending either staircase used the same pathway from the foot to the falls, that part from the foot of defendant's staircase being necessarily passed over by those who came down by plaintiff's staircase. Both plaintiff and defendant were in the habit of furnishing visitors with dresses to wear, and with guides to conduct them down their respective staircases to and along this pathway, to and under the edge of the falling water, and each derived a considerable profit from the payments made by such visitors.

By letters patent, dated 15th May, 1860, the Crown granted to Saul Davis all that parcel of land in the township of Stamford, in front of the premises owned and occupied by him extending from a point three feet north of the staircase built by him, and along the top of the cliff to the falls, and from the top of the cliff down to low water, reserving to the Crown a power of summarily terminating the lease without making any compensation.

Habendum to Saul Davis, his executors, administrators, and assigns for ten years, yielding and paying \$500 per annum, the said lease being granted on the following condition: That free access be permitted to the falls by the staircase and pathway at the foot of the rock at all times to all persons, on payment of a sum not to exceed $\frac{25}{100}$.

"Mr. Thomas Barnett, or any assignee of the premises now occupied by him at the falls, or any regularly employed guide or guides in his service while conducting any person or persons to, under, or from the sheet of water, &c., be exempted from all charge for the use of the said pathway;" that the said lessee erect no additional buildings on the demised premises, and that the lease shall be void if the rent is not duly paid, if any waste, spoil or destruction is committed on the premises, or if the lessee suffer the pathway or staircase to get out of repair so as to impede the access to the sheet of water, or commit any other breach of any condition therein contained.

Davis assigned this lease to the defendant in consideration of \$100 by deed poll dated 26th May, 1860, and about the 1st June following, a fence of two inch boards was put up by

defendant, a little north of Davis' stairway on the premises demised by the Crown, and across the pathway, so as to prevent access to the falls from the foot of the plaintiff's staircase. Very soon after plaintiff cut an opening through it, and let persons pass along the pathway, and then defendant put up a gate which defendant's people kept locked at times, leaving it open at others, thereby obstructing visitors who came with guides furnished by the plaintiff, and making it uncertain at all times whether the pathway was free of access or no, unless by going down defendant's staircase when the fence would be no obstruction to the approach to the falls.

For this obstruction the present action was brought. A good deal of evidence was given as to damage, which was the only matter submitted to the jury. There was no clear evidence when this pathway was constructed, nor by whom, nor how long it had been in use, and no question of public right or of easement to approach and quit the falls was raised. The jury settled the damages at £50, and a verdict was entered for that sum for plaintiff, with leave reserved to defendant to enter a verdict for him, if in the opinion of the court upon the evidence and on the construction of the lease the plaintiff was not entitled to succeed.

In Michaelmas Term, *Freeman*, Q. C., obtained a rule *nisi* to enter a verdict for the defendant, pursuant to leave reserved, or for a new trial on the ground of excessive damages.

Cameron, Q. C., showed cause. He contended that reservation made, operated to confer on Barnett, the plaintiff, the use of the way across this close demised to Saul Davis by the Crown, and therefore this action, was for an obstruction to this way, was maintainable.

Eccles, Q. C. and *Freeman*, Q. C., insisted that Barnett had no greater right to the use of the pathway than the public generally had, except the exemption from paying. The condition "that free access be permitted to the falls by the staircase and pathway at the foot of the rock at all times to all persons on payment, &c.," was the only part of the patent which could be held to confer a right of using the pathway, and what followed only enured to exempt the plain-

tiff and his guides from that payment to which every other person was subject. That no obstruction had existed to the approach to the falls, if parties descended by the defendant's staircase, which the plaintiff and his guides had always been allowed to do, free of charge; that defendant paid a rent, and was allowed to charge for admission by the staircase and pathway to the falls, and that so long as this approach was left free from hindrance, the plaintiff had no right to sue because he could not get into this pathway, excepting by the defendant's staircase. The right claimed by plaintiff was claimed only as a private right, and no foundation existed for it, unless under this patent.

DRAPER, C. J.—The first count claims a right of way over a certain close staircase and pathway, by reason of plaintiff's ownership and occupancy of a piece of land nearly adjacent, for himself and servants, while conducting persons to and from the falls, and complains that the defendant wrongfully obstructed this way.

The second count claims the right by himself and his servants, under and by virtue of certain letters patent, to Saul Davis, at all times of the year to conduct persons visiting the falls over the close thereby demised to Davis, and by the staircase and pathway from the plaintiff's land to the falls.

I see no evidence whatever that plaintiff has any easement or private right of way over the close and premises demised to Davis, other than what he is entitled to under the letters patent stated in the second count and produced in evidence at the trial. He shows no other grant or prescription to entitle him to such easement or right, as appendant or apurtenant to his own land. So far as the evidence shews the foundation of the plaintiff's right, it applies to the statement in the second count rather than to that in the first.

But the defendant has not put the plaintiff's right in issue. He pleads only that he did not obstruct the staircase or pathway reserved for the use of the plaintiff in and by the said letters patent.

The plaintiff asserts no other right in fact than that which

the defendant admits, namely the right reserved under the letters patent. The only matter denied by defendant is that there has been any infringement of the right reserved.

In considering whether there has been an obstruction it is impossible to avoid examining what is the right asserted and conceded. So far as the evidence shews, it seems plaintiff owns premises separated from the edge of the perpendicular bank of the river Niagara by a road, and to the north of the premises similarly situated as respects the edge of the bank, which are occupied by defendant or by Davis. The close described in the patent, is in fact the precipitous steep from the edge of the bank down to the water of the river opposite to Davis' premises. The steepness of this bank is so great that there could be no descent to the pathway crossing the lower part of the demised land, where it not for a staircase on this land and referred to in the letters patent. The plaintiff has also a similar staircase opposite his premises leading down to a pathway, which is in fact a continuation of the pathway across the demised close; when or by whom this pathway was constructed either across the lot demised to Davis, or to the north of it, does not appear. It is not asserted that it is a *public* footway. Plaintiff, it appears, built his staircase about four years before the trial. It was not shewn that the Crown had leased or granted any part of the bank over which this pathway crosses, excepting that portion described in the letters patent. According to the evidence the defendant's staircase was built by Davis a considerable time before he obtained his lease, and in building it he must have intruded on the Crown lands. Possibly the plaintiff has done the same thing. The obstruction was about four feet north of the foot of the defendant's stairway, and prevented the plaintiff and his servants from reaching the falls, along the pathway, if they descended the bank by the plaintiff's stairway; if they descended by the defendant's stairway the path was open to the falls, but they could not go northerly from the foot of the defendant's stairway without meeting the fence and gate erected by defendant. The first count only complains of an obstruction of the way. The second, of an obstruction of the staircase and way.

In what way the letters patent could operate to confer any right upon the plaintiff is not now the question. The defendant concedes a right reserved to the plaintiff under the patent, and the plaintiff sets up no more right but that which the patent gives, and which is not disputed.

The condition in the patent is, "that free access be permitted to the falls by the staircase (that built by Davis) and pathway at the foot of the rock at all times to all persons, on payment of a sum not to exceed 25 cents, Mr. Thomas Barnett or any assignee of the premises now occupied by him at the falls, or any regularly employed guide or guides in his service while conducting any person or persons to, under or from the sheet of water, to be exempted from all charge for the use of the pathway.

An exemption from a charge does not in all cases import the conveyance to the party exempted (*Attorney-General v. Downshire*, 5 Price 267) of the right from which the charge itself arises. The right to use by plaintiff himself and his servants was (as is conceded) granted, and he and they are included in the clause which stipulates that free access should be permitted to all persons; the exemption from paying, as others might be compelled to pay for such access, only placed plaintiff and his servants in the same position as those who had paid, they became entitled to the use of that which was covered by the patent, namely, access by the staircase and pathway. The Crown reserving a rent from the land demised, enabled the tenant to make a profit out of those desirous of visiting the falls, but thought fit, in favour of the plaintiff, to relieve him and his servants employed in a particular capacity from this payment, and to allow him to have free access by the staircase and pathway in all respects, *i. e.*, free from charge and interruption.

Then, has this right been obstructed. The plaintiff's evidence shews that he does not desire "free access by the stairway and pathway." What he seeks to enforce is access to the pathway without using the stairway, and it is his alleged right to this that is evidently the real subject of his suit as shewn in evidence. But as I understand the right asserted in the declaration and admitted by the plea, it is a

right reserved under the letters patent, and unless the right so admitted is infringed, the plaintiff ought not to recover.

In order to determine this, a good test is afforded by the question—suppose the Crown were instituting a proceeding to forfeit the lease, because of a breach in the condition, in not permitting the plaintiff and the guides employed by him to have free access, as mentioned therein. Might not the defendant well answer that the staircase and pathway have always been open to all persons desiring to go to the falls? and would this defence be rendered nugatory by shewing that there was an obstruction to free access to the falls on the very limit and boundary of the land demised, separating that land from the land adjoining over which there was a pathway joining the pathway referred to in the lease at this limit of the land? The defendant, I think, would maintain his defence, for this would not be an obstruction of a pathway on the land granted, contrary to the terms of the condition. He would permit free access by the staircase and pathway to all persons, and it cannot be presumed the Crown intended a free access in a way which would either deprive him of the payment, or which might render it inconvenient or more expensive for him to collect payment, while they were insisting on a rent for land which, except in this way, could yield no profit to the tenant, and compelled him to keep both the staircase and the pathway in repair. And this last-mentioned condition suggests another test—namely, whether, if the defendant kept the staircase and the pathway from the foot of it to the sheet of water in repair, would he be guilty of a breach and so incur a forfeiture if he allowed the four feet or thereabouts leading northerly from the foot of the staircase to the northern limit of the land demised, to become impassible for want of repair.

My present opinion is, that the only reservation of access to the falls is for all persons by the staircase and pathway, subject to a payment, from which the plaintiff and the guides employed by him are expressly exempted. That this access, namely, by the defendant's staircase and pathway has not, so far as is proved, been interrupted, nor has any attempt been made to enforce payment from the plaintiff or his

guides, and therefore that the verdict should be for the defendant.

The pleadings present no question of a public right of way. The defendant has not either at the trial or during the argument raised any question as to the sufficiency of the letters patent to create a reservation in favor of the plaintiff, which will give him a right of action, if it be infringed, nor whether the whole matter, being expressed by way of condition, a breach of which is declared to be a ground of forfeiture, the defendant is liable to any other proceeding. I express no opinion, therefore, on any of these points.

See Com. Dig. *Fait* E. 5; Touchstone, 78, 120; Co. Lit. 47a, 143a, 186a, 213b, note; R. v. Marq. of Downshire, 5 Price, 269; Oates v. Frith. Hob. 130, 151, 274; 3 Saund. 370n; Viners Abr. Reservation; Whitlock's case, 8 Co. 69 b; Meor. 162; 2 Roll. Ab. 447; Borough's case, Lord Raym. 36; Plow. 133a; Dy. 33a; Moore v. Earl of Plymouth, 7 Taunt. 614; Doe v. Lock, 2 A. & E. 705; Chetnam v. Williamson, 4 Ea. 469; Pickering v. Noyes, 4 B. & C. 639; Durham, &c. Railway Co. v. Walker, 2 Q. B. 940, 967; Pannell v. Mill, 3 C. B. 625, 11 Jur. 109; Barlow v. Rhodes, 1 C. & M. 439.

HAGARTY, J.—The first count claims for plaintiff a right of way from his own land, over a certain close, staircase, and pathway, to the falls and back again, and aduers an obstruction by defendant.

The 2nd count sets out the grant to Saul Davis, and avers a right in plaintiff and his servants "over the said close by the said staircase and pathway to, under, and from the falls," and charges that defendant "wrongfully obstructed the said staircase and pathway," whereby plaintiff was deprived of his access to said staircase and pathway.

There is no plea denying the right of way claimed, defendant merely denies obstructing the way reserved for the plaintiff by the letters patent.

I cannot see on this record that plaintiff is complaining of any thing except of an interruption to his approach to

the falls by a staircase and pathway, nor could I gather from his language that he was claiming a right to reach or use the pathway except over the staircase. I do not see any interruption to such a right which the record admits he has.

The Crown grants on condition of free access being permitted to the falls by the staircase and pathway at the foot of the rock at all times to all persons, on paying a sum not to exceed 25 cents.

On these words I can see no room to doubt that the only reservation is, to pass by the defendant's staircase and pathway.

Plaintiff relies, however, on the succeeding special exemption in favor of him and his guides, from any charge "for the use of the said pathway," omitting the coupling it as previously with "staircase."

But the answer to this seems to be that any right for the interruption of which he can maintain this action, must be under the earlier clause in favour of "all persons," and this right (if it exist) is, I think, defined to be to approach and retire by defendant's staircase and pathway—not to vest in defendant or in any other person a right of way over another pathway over defendant's close leading to the foot of the staircase, but not necessarily used by those availing themselves of the general reservation in favor of all the world to approach the falls over defendant's close by his staircase and pathway.

The words exempting plaintiff and his guides from payment can hardly, I think, be held as entitling him to maintain this action for obstructing his alleged right of way, or to impliedly grant or reserve to him any further or other right over any way not reserved to him in common with all the world.

From the course taken in argument and from the state of the pleadings, it seems unnecessary to notice many things that might be readily suggested as interfering with the plaintiff's right to maintain this action.

I think defendant entitled to judgment.

Per cur.—Judgment for defendant.

HAM (ADMINISTRATRIX) V. THE GRAND TRUNK RAILWAY COMPANY.

Railway—Crossing—Duty of company—Indictment of locomotive driver for manslaughter—How far an answer to an action for damages—Administrator.

Held, that the fulfilment of the requirements of the statute (Con. Stat. of Canada, ch. 66, secs. 103, 104) by the railway company as to the ringing the bell or sounding the whistle at or approaching crossings does not of itself free the company from the responsibility of accidents, or damage arising from any neglect or breach of duty by which any damage may arise.

2nd, That the acquittal of the locomotive driver on a train, upon a charge of manslaughter for the death of the party on account of whose death the action for damages was brought by his administratrix, did not constitute any answer to the action.

DECLARATION against defendants for carelessly and negligently driving, conducting, and managing a locomotive engine, the property of defendants, and then passing across a highway along which plaintiff's husband, Charles H. Ham, was lawfully riding in a waggon drawn by two horses, whereby the engine ran against, over, and upon the said Charles H. Ham, and he was so crushed and bruised that he then and there died, and the plaintiff claims damages for her benefit as widow, and for the benefit of her children.

Pleas 1st. Not guilty by statute, Con. Stat. of Canada, ch. 66, sec. 83.

2nd. That the accident was caused by the want of proper care and diligence on the part of the said Charles H. Ham, and that he, by his conduct on crossing the said highway and by his carelessness materially contributed to the happening of the accident. Issue thereon.

The case was tried at the Toronto fall assizes, 1860, before *Richards, J.*

The collision, which resulted in the death of Charles H. Ham, and which was the foundation of this action, took place between six and seven in the evening, on the 11th July last. The defendants train left the Dou, going east, at twenty minutes past six, the usual time for leaving being five minutes past six. The accident occurred at a place rather more than two miles or two and a half miles east of Scarborough station, where the railway crosses the high road from Toronto to Kingston. About half a mile, or perhaps more, west of

this point, the railway crosses a side line, and this place is called Jackson's crossing. Going east from thence, the railway passes through a deep cutting, thirty feet deep in part, and over this part is a bridge called commonly Anne's bridge. After passing this going further east, the railway comes on or nearly on to the ordinary level of the land, and after 300 or 400 feet, passes into another cutting about ten feet deep, in passing through which it crosses, on a descending grade, the Kingston road.

Several witnesses spoke of this crossing as very dangerous to persons travelling along the Kingston road, going eastward. It was stated, that when the train was passing between the two cuttings, it was visible from the Kingston road, but ceased to be so when about 22 rods from the crossing, and that people travelling along that road, going eastward, could not see along the railway track until they came within about two rods of the crossing, which, considering the speed at which the trains usually travelled, affords very little time either to stop, or to hurry on, so as to avoid the train. It was sworn that "all regard it as an extremely dangerous place;" that "after you can see the cars it is almost impossible to get out of the way when going east." One witness stated that "he had been nearly caught several times." Another "that it was very dangerous, and accidents are very nearly occurring every week." The train was described by the plaintiff's witnesses as "going very fast." One witness said, "fast as I ever saw it—faster than it usually goes there." The conductor of the train who was called for the plaintiff, stated that they were running at 30 miles an hour; that they usually ran 28 miles an hour including stoppages. He could not say, for he had not taken notice, that they were or were not running through the cutting at more than their usual speed. It was stated that when the train comes through the cutting it makes a noise as if it were at a distance. It was proved that the deceased was driving a waggon and pair of horses along the Kingston road going eastward. His wife, the plaintiff, was with him. He was driving moderately, and so far as the opinion of the witnesses who saw them went, neither of the two seemed aware that

the train was near. But as the horses were crossing the railway track, on a walk, according to some of the evidence deceased, evidently in great alarm, rose up and struck the horses, not having time to back them. The hind wheels of the waggon were struck and broken, and deceased was thrown out and killed. The plaintiff, in order to establish negligence, gave evidence that the usual and requisite alarm or notice of the approach of the train was not given; that the bell was not rung, nor the whistle sounded after passing Jackson's crossing, or at all events after passing Anne's bridge, until the two sharp sounds, the signal for putting down the brakes, was given, just before approaching the crossing, when the witnesses said it was too late to be of any use or protection to the deceased, and it was upon this evidence of negligence the case went to the jury.

The defendants called, among other witnesses, the engineer who drove the locomotive on this occasion. His evidence was objected to, but was received, his name being endorsed on the record. Though not strictly proved it was notorious that he had been indicted for manslaughter in killing the deceased, Charles H. Ham, and had been tried and acquitted at the same assizes about ten or twelve days before. He said it was his duty to sound the whistle 120 rods before arriving at each crossing, and to ring the bell 400 yards before. That there was a heavy down grade at this place, and they were travelling between 30 and 35 miles per hour then; that they sounded after leaving Scarborough before reaching Jackson's line, about quarter of a mile; commenced sounding again at Anne's bridge, and the bell was kept ringing until they came to the crossing; that the whistle was sounded at Humphrey's crossing again (a farm crossing on the level about half way between Anne's bridge and the crossing where the accident occurred), that is when they first saw the crossing. He first saw deceased when coming on to the crossing about 30 feet from the track, and saw deceased was not looking, and he, the engineer, whistled again. Deceased and his wife both looked, and the engineer immediately, when he saw them crossing, whistled to down breaks, and they struck the waggon. He stated when he sounded

the extra alarm, deceased stopped his horses and looked at the train. His statements were confirmed by several witnesses, some of whom were on the train, and some who were in the neighborhood of the crossing at the time. Two or three agreed with him as to the rate at which the train was passing, and to the assertion that the whistle was sounded at and after passing Anne's bridge, there was strong corroborating testimony. No evidence was given on the defence as to the peculiarly dangerous character of this crossing, as it was represented by the plaintiff's witnesses.

The learned judge told the jury that the ground on which this action lies is that the company's servants in the managing of the train have been guilty of negligence; that if the death was caused by the want of care and negligence of the deceased the jury should find for defendants. That the statute prescribes the duties to be performed by the company and their servants, and if they did their duty as so pointed out, they cannot be liable.

The jury found for plaintiff.

In Michaelmas Term, *J. H. Cameron*, Q.C., obtained a rule nisi for a new trial, the verdict being against law and evidence, and the judges charge; for there was no evidence of negligence on the part of the defendants or their servants to warrant the verdict. He remarked on the fact that the engineer had been acquitted on the charge of manslaughter without hearing his counsel's address, and without leaving their box, as a strong circumstance to show the accident was not the result of negligence.

Bell of Toronto showed cause, and

Cameron, Q. C., supported the rule. No cases were cited on either side.

DRAPER, C. J.—The declaration is very general in its statements. It is confined to a charge of negligence in driving, conducting and managing a locomotive engine not specifying any way in what the negligence consisted. While a great portion of the plaintiff's evidence was directed to show that the negligence was the not giving the necessary

signals for alarm and caution by sounding the whistle and ringing the bell, and the evidence on the part of the defence was almost exclusively limited to asserting that in those respects the statutory regulations had been obeyed; and the charge of the learned judge shews clearly that this was the principal question that went to the jury, though they were directed as to the second issue. No objection is advanced against the direction on the part of the defence.

The Consolidated Statute of Canada, ch. 66, sec. 103 and 104, requires that every locomotive engine should be furnished with a bell of at least thirty pounds weight, or with a steam whistle, and that the bell shall be rung or the whistle sounded at the distance of at least 80 rods from every place where the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway, under a penalty of \$8 for every neglect thereof to be paid by the company, who shall also be liable for all damages sustained by any person by reason of such neglect. I do not interpret these provisions to mean that if the company have on their locomotive a bell or whistle, and ring the one or sound the other as is set forth, they are consequently freed from responsibility for damages that may be occasioned by the use of their locomotives upon the railway, but rather to make it imperative that these precautions shall be adopted, and that the absence of them shall entitle any person suffering damage from the neglect or omission, to recover compensation. There may be many other acts of negligence which will entitle a sufferer to compensation, though these requirements are exactly fulfilled.

I take it, however, that it is on this point the verdict has been rendered, for, as to the second issue, I do not think it can be with propriety affirmed, that the defendants' evidence established that the plaintiff, by careless conduct, contributed to his own death. The strongest view that the evidence warrants, in my judgment is, that he was terrified by the close proximity of the train and its rapid approach. That under this influence he may have lost the moment which if rightly used, would have saved his life, is possible; but if the defendants were otherwise liable, this could not and

ought not in my judgment to relieve them. A very careful study of the evidence has led me to the conclusion that the deceased was wholly taken by surprise when he was just crossing the railway track, by perceiving the engine closely approaching, and I refer to the evidence of the defendants' engineer as confirming and not shaking this conclusion.

I do not think the acquittal of the engineer on the charge of manslaughter is at all conclusive to shew that the present verdict is wrong. The jury in this case may have considered that he was not proved to be responsible for the rate of speed at which the train was travelling, 35 miles an hour on a heavy down grade, and approaching the main travelled road between Toronto and Kingston; that it was for others rather than for him to have provided that, on approaching a crossing so very dangerous as this is described to be, the speed should be materially diminished. On the mere conflict of evidence as to the ringing of the bell or the sounding of the whistle, and I assume there was not less conflict on his trial than on the present case, the jury may have given him the benefit of a doubt, which the jury in this instance did not feel themselves in any way bound to extend to his employers.

I have not been able to satisfy myself that there is any sufficient ground for making this rule absolute, limiting my attention to the case as presented to the jury on both sides at the trial, neglect or not, in ringing the bell and sounding the whistle. There certainly is abundant evidence to sustain a contrary finding, but it is so purely a question of fact on the whole evidence, that I should require some reason beyond the conflict of evidence, or even an impression (if I had one) that it rather preponderated on the side of the defence, to induce me to overrule the finding of the jury. I cannot say I have found any satisfactory reason for taking that course, while I meet with some considerations which lead in an opposite direction.

I refer to the language used by Sir J. B. *Robinson*, C. J., in *Renaud v. The Great Western Railway Company*' (12 U. C. Q. B. 424,) "What we constantly find done upon railways where the track crosses a public highway which is

unenclosed, is a sufficient proof that caution is deemed to be necessary, *for we usually see the speed slackened*, and the train going at such a rate that in case of anything unexpected being found to be upon the track, it could be stopped in time to prevent mischief, *and it is surely the most reckless folly not to observe this caution*, for how can it be known what people or animals may be wandering or loitering along a highway which is accessible to every thing."

The evidence shows the train was going at the rate of 35 miles an hour on a heavy down grade, the usual rate being 28 miles an hour, including stoppages, and according to the evidence of a witness for the defence, "it was a mile and a half before" they brought up. The speed certainly was not slackened, and it was manifestly impossible to stop the train going at that rate "in time to prevent mischief." If it be the "most reckless folly" to neglect this caution in ordinary cases of a railway crossing a highway, it must *a fortiori* be so in this case, if the evidence of the peculiarly dangerous character of this crossing is to be relied upon. If we granted a new trial we could not refuse the plaintiff leave to add a count to his declaration to bring up the question of negligence, if he could not do it under the present count, which I do not decide. And referring still to the evidence of peculiar danger, the question might be presented in another form, namely, for negligence in construction, and in using a road so dangerously constructed and laid out. Of course, in these observations, I am not intimating that the defendants might not as to this latter point abundantly meet the statements of the plaintiff's witnesses in this respect, but looking at the evidence on both sides, I do not readily see how they could do so on the point of not slackening a speed so apparently dangerous under the circumstances.

I think the rule should be discharged.

Per cur.—Rule discharged.

HAMILTON ET AL. V. HOLCOMB ET AL.

*Bill of exchange—Judgment thereon against drawer and acceptors—
Arrest of one defendant on ca. sa.—How far a satisfaction.*

The arrest upon a *ca. sa.*, and subsequent discharge of one of several defendants, by the plaintiffs, upon an action against the drawer and acceptors of a bill of exchange, *held*, not to be a satisfaction of the judgment so as to prevent the subsequent issue of a *fi. fa.* thereon against the other defendants. 2nd.—That the arrest and discharge of the acceptor of a bill of exchange, operating as far as he is concerned as a discharge from the debt, the drawers are thereby prejudiced, and entitled to remedy.

On the 7th of January last, *Burns, J.*, made an order in this cause, after hearing the parties upon affidavits, that the writ of *feri facias* issued in this cause, and directed to the sheriff of the united counties of York and Peel, dated the 5th of July, 1860, against the goods and chattels of the defendants, and all proceedings had thereon should be set aside, and a memorandum of satisfaction be entered as to the judgment signed in this cause on the 12th of January, 1858, for £506 11s. 8d. damages, and £19 7s. 6d. costs.

This order was now moved against by *R. A. Harrison* in the alternative, either to set it aside altogether, or to set aside so much of it as directed a memorandum of satisfaction to be entered.

Galt, Q. C., shewed cause, referring to *Jacques v. Withy*, 1 Term R. 557; *Clarke v. Clement*, 6 T. R. 525; *Tanner v. Hague*, 7 Term R. 420; *Cattlin v. Kernot*, 3 Com. B. N. S. 796.

R. A. Harrison, in support of the rule, cited *Vigers v. Aldrich*, 4 Bur. 2482, which reviews all the cases cited by *Galt, Q. C.*, and distinguishes them from the present one. *Blackburn v. Stupart*, 2 East, 243; *Ballam v. Price*, 2 Moore, 235; *Lambert v. Parnell*, 10 Jur. 31; S. C., 15 Law J. Q. B. 55; *Denton v. Godfrey*, 11 Jur. 800; *Ward v. Broomhead*, 7 Ex. 726; *Beard v. McCarthy*, 9 Dow. P. C. 136; *Thompson v. Parish*, 5 C. B. N. S. 685; *Hayling v. Mullhall*, 2 W. Bl. 1235.

DRAPER, C.J.—It appears by the affidavits that the defendant *Holcomb*, together with his partner, one *Henderson*, drew

a bill of exchange upon the other defendants, McPherson and Crane, and that the plaintiffs, as holders of this bill, obtained a judgment against all the defendants, whom they sued in one action under the provisions of the statute of Upper Canada. About the first of July, 1858, a *ca. sa.* was issued in the cause, on which the sheriff of Frontenac, Lennox and Addington arrested the defendant, McPherson, who gave bail to the limits. The defendants, McPherson and Crane, had on the 2d January, 1858, executed a deed of assignment of all their real and personal estate in trust for the benefit of all creditors who should execute the same. The plaintiffs, by their duly authorised attorney, executed this assignment on or about the 20th of July, 1858, and their attorneys in the action signed and sent to the sheriff an authority, dated the 3rd of July, 1858, for McPherson's discharge, and the sheriff discharged him accordingly. On the 5th of July 1860, the plaintiffs sued out a writ of *feri facias* against the goods of all three defendants, directed to the sheriff of York and Peel, endorsed to levy £525 19s. 2d. interest from the 12th of January, 1858, £3 for writs and his own fees, under which the sheriff has levied upon the goods of the defendant Holcomb. The plaintiff Hamilton made an affidavit, that when McPherson was discharged from custody it was upon the agreement that such discharge should not affect the debt in this suit or any other remedies on the judgment in any way.

The principal difficulty I have felt in this case, is as to the effect of our statute, (Consol. St. U. C. ch. 42, s. 23, 24, 25, 26, 31, 32, 35,) by which the holder of any bill of exchange or promissory note is enabled, and in one sense obliged, to include drawers, makers, acceptors and endorsers in one action, for if he brings several suits, there shall be collected the costs taxed in one suit only, at the election of the plaintiff, and in the other suits the actual disbursements only. By forms given for declaring, the plaintiff after stating his cause of action against all the parties sued, very much in the old form, concludes "by reason whereof the said defendants became jointly and severally liable to pay the plaintiff," &c.

The 23rd section expressly enables the plaintiff to proceed to judgment and execution in the same manner as

though the defendants were joint contractors, while the 25th provides that judgment may be rendered for the plaintiff against some one or more of the defendants, and in favor of some one or more of the defendants against the plaintiff, according as the rights and liabilities of the respective parties may appear, and when judgment is rendered in favour of any defendant he shall recover costs in the same manner as if judgment had been rendered for all of them. There is no special provision in the statute as to pleading except with regard to set-off, but the practice has uniformly been for each defendant to plead such matters as may constitute his defence, without regard to the others; making, drawing, accepting, endorsing, as well as presentment, or notice of dishonor, may be all put in issue according to the situation of the party pleading; and the 26th section enacts that the rights and responsibilities of the several parties to a bill or note as between each other shall remain the same as if the act had not been passed, saving only the rights of the plaintiff, so far as they may have been determined by the judgment, and one defendant is entitled to the testimony of any co-defendant as a witness, if he would have been entitled to his testimony, had such co-defendant not been a party to the suit or individually named in the record.

Taking the foregoing clauses together, I should have agreed readily to the conclusion of my brother *Burns*, that the moment judgment is entered, it becomes one judgment, creating one new and joint liability against all the defendants; but the 32nd section provides, that any person so sued may set off against the plaintiff any payment, claim or demand, whether joint or several, which in its nature or circumstances arises out of or is connected with the bill or note sued on, or the consideration thereof, just as if each defendant had been separately sued, and if the jury, after allowing any set-off, find a balance in plaintiff's favor, they must state in their verdict the amount which they allow each defendant as a set-off. I suppose the object is that the verdict may thus enable the defendants to ascertain their rights and liabilities as between themselves, and that the plaintiff will still have a general verdict against all the defendants for the balance, and enter judgment accordingly.

Then the next question is, whether the taking one of several defendants, against whom a judgment has been recovered in execution upon a *ca. sa.* and afterwards discharging him out of custody, operates in effect as a satisfaction of the judgment as regards all the others, though the plaintiff has recovered nothing.

Upon this point I still entertain considerable doubt. It appears by the affidavit, that McPherson was admitted to the benefit of the gaol limits, and the Consol. Stat. of Upper Canada, ch. 24, s. 37, provides that the party at whose suit a debtor is charged in execution, may, when the debtor has taken the benefit of the limits, sue out a *fi. fa.* against his land or goods, notwithstanding the debtor is charged in execution, and the execution of the *fi. fa.* is not to be stayed, but shall be continued although the debtor be recommitted to close custody. Now if a creditor having his debtor in execution on the limits, obtain satisfaction through a *fi. fa.* against lands or goods, the debtor must *ipso facto* be discharged, and if lands or goods amply sufficient to pay the debt were taken in execution, I cannot believe that by the creditor thereupon consenting to the debtor's immediately leaving the limits, the right to complete the execution would be affected. I find nothing in the act to justify such a conclusion, and it appears to me contrary to reason, and I have great difficulty in drawing a tenable distinction between such a case, and the case of an execution against the goods of one defendant, where another defendant is a prisoner on the limits. The difference created by our peculiar enactment in this respect, may take this case out of the principle of the English cases, the dicta in which are not altogether consistent. (See *Herring v. Dorrell*, 4 Jur. 800, and the cases there cited.) So long at least as McPherson was a prisoner on the limits, I strongly inclined to the opinion that it could not be held that his custody prevented a *fi. fa.* against the goods of his co-defendants, if as to them the *ca. sa.* was returned *non sunt inventi*.

There is however another ground on which I incline to think the decision of my brother *Burns* may be upheld.

The defendant *Holcomb* has only become liable jointly

with the other defendants, by reason of his being sued with them under our statute. Originally, he was drawer of the bill, of which McPherson & Crane were acceptors. If the plaintiff's had brought a separate action against the acceptors (and but for our statute they must have done so) and recovering judgment had taken McPherson in execution and then had discharged him, they could not, as I think, have maintained a subsequent action against Holcomb. (See *Hayling v. Mullhall*, 2 W. Bl. 1235, the marginal note is wrong as pointed out by Lord Eldon in *English v. Darley*, 2 B. & P. 62, *Michael v. Myers*, 7 Jur. 1156, 6 M. & Gr. 702, in which previous cases are cited.) And in my opinion as at present advised the court are warranted in affording the defendant Holcomb relief upon this ground, notwithstanding the judgment recovered against him, and the 26th section of the act will, I think, uphold this conclusion. The plaintiff's have discharged a party against whom Holcomb would have a remedy over, and thereby I think have discharged him.

But as this view is not perfectly clear, and the point itself is new, my brothers think it would be better not to dispose of it on this motion, but that the order should be varied by setting aside the *fi. fa.* and rescinding so much as relates to the entry of satisfaction. The plaintiffs may then, if so advised, bring an action on the judgment, and the question be carried into appeal. I concur with them in making the rule in this form, without costs.

Per cur.—Rule accordingly.

IN RE. GEORGE LOUNT, REGISTRAR.

Registration—Fees of, when documents to be recorded in more than one township—How chargeable.

Held, that the registrar is only entitled to charge for one registry of any document to be recorded in one or more townships, provided the number of words recorded "counting folios" does not exceed 800, and all in excess of 800 words are to be charged per folio as allowed by the Statute Con. Stat. U. C., ch. 89, sec. 33, namely 13¹/₁₀ cts. per folio.

Spencer obtained a rule calling on Mr. Lount to shew cause why a mandamus should not issue commanding him to put on record in the registry office in the county of Simcoe,

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Per cur.—Rule accordingly.

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Spencer obtained a rule calling on Mr. Lount to shew cause why a mandamus should not issue commanding him to put on record in the registry office in the county of Simcoe,

a certain mortgage, dated on or about the 27th of December, 1860, and made from William Proudfoot and wife, to Mary McMichael and Jesse McMichael, on the ground that the same has been sent to him for registration, and his fees for recording the same have been paid him.

On moving the rule he filed an affidavit that he had computed the number of words in the said memorial, that to the best of his knowledge and belief it contained no more than 475 words, without counting the words contained in the description. That the number of words contained in the description together with the necessary certificates to be endorsed on the mortgage would not exceed 700 words; that the application is made on behalf of the mortgagees in order to compel the registrar to record the mortgage; that the total number of words contained in all the necessary entries to be made in all the books, including certificates, would not exceed, in his belief, 2250 words in excess of the first 800 words.

And a second affidavit, that about the 31st of December last, the deponent enclosed to the registrar a mortgage and the memorial thereof for registration, with 6s. 3d. for fees, to which he received a reply from the deputy-registrar that the fees were \$6.25, as the lands mentioned in the mortgage were in five townships, which with the mailing fee would amount to \$6.50, and claiming that sum. That he replied to the registrar that it was not the practice in the registry office, Toronto, to charge the full fee for each township, and requested him to lose no time in putting the mortgage on record, and that what the statute allowed him beyond the 800 words would be remitted. That the registrar replied, affirming his first letter, and stating that on receipt, &c., the deed would be recorded. That deponent thereupon calculating the number of words as well as he could, sent \$3.25 more making \$4.50 in the whole. The registrar replied, still demanding \$6.50, *i. e.*, \$6.25 for recording, and \$0.25 for the mailing fee.

A. Wilson, Q. C., shewed cause, referring to Consolidated Statute U. C., ch. 89, secs. 30, 33, 74, sub-sec. 2; *Smith v. Ridout*, 5 Q. B. U. C. 617.

Spencer supported the rule.

DRAPER, C. J.—By Consolidated Statute U. C., ch. 89, sec. 33, it is enacted that when any deed, will, or other instrument embraces different lots or parcels of land situate in different localities in the same county it shall only be necessary to furnish one memorial of such deed, &c., and such memorial shall be copied into the registry book for the city, town, township, or place in which the different parcels or lots of land are situate in the same manner and to the same extent only as if a separate memorial had been furnished in relation to the lands situate within such city, town, township, or place respectively, and the registrar shall make the necessary entries and certificates accordingly.

By section 74, sub-section 2 of the same statute, the registrar is allowed for recording every deed, conveyance, &c., &c., including *all necessary entries* and certificates, one dollar and twenty-five cents, but in case *such entries* and certificates exceed 800 words, then at the rate $\frac{1s. 1}{100}$ for every additional hundred words, but in counting folios in cases within the 33rd section only one certificate of registry shall be charged for, and the marginal certificates, notes, or references, shall not be charged for. The 30th section of the act makes it the registrar's duty to "*enter*" every memorial in the registry book.

The case of *Smith v. Ridout*, (5 U.C.Q.B. 617) was decided under the 9th Vic., ch. 34. The 22nd section of that act made it the duty of every person holding or executing the office of registrar to keep and caused to be used for that purpose a separate registry book for each township, reputed township, city and town, the limit whereof shall be defined by law within the county or riding for which he shall be registrar. The 68th section of the Consolidated Statute contains a similar provision in almost the same words. The 16th section of the former act allowed the registrar for the recording of every deed, conveyance, &c., the sum of 2s. 6d., and no more, in case the same doth not exceed 100 words, but if it exceed 100 words, then at the rate of 1s. for every hundred words after the first 100. Upon this statute the court held that the registrar was entitled to "charge the same rate of each registration, that is to say, 2s. 6d. for the first hundred

words, and 1s. for each 100 words above the first 100, which computation is to be made upon the words contained in the recording of every such deed, that is upon the contents of the entry in the registrar's book, and not upon the words contained in the deed or conveyance itself." The judgment of the court is stated to be for the defendant, and so it certainly was, on the ground that the registrar's fees were not to be computed by the number of words contained in the deed to be recorded, or even the memorial produced for registry thereof, but by "*the contents of the entry in the registrar's book*," and it appears that the court allowed 2s. 6d. for the first hundred words in each entry in each separate book, at least, I so understand the judgment as printed, though a memorandum made by me at the time, for I was a member of the court when the judgment was given, tends towards the conclusion, or would admit of the interpretation, that the whole of the entries made by the registrar were to be put together as constituting one recording of the deed, and that the registrar had the right to charge 2s. 6d. for the first 100 words, and 1s. for every subsequent hundred.

But, however this may be, the words of the act now under consideration, differ materially from those of the 16th section of the 9th Vic., ch. 34, though the fees are as in the former act, "*for recording every deed*," &c. A gross sum of \$1 25c. is given for that service, "*including all necessary entries and certificates*," and a charge for each 100 words additional to the first 800, but "*in counting folios*" (i.e. each 100 words) under the 33rd section, only one certificate of registry is to be allowed for. The 33rd section provides that in case of lands in several townships, only one memorial shall be necessary, which shall be copied into (synonymous with entered in) each proper township book to the same extent only as if there were no lands mentioned therein, lying in any other township, "*and the registrar shall make the necessary entries accordingly*," of which entries the *folios* are to be counted, as I read the provisions regulating the registrar's fees.

It appears to me the plain meaning of these provisions put together is that the "necessary entries" in each township

book, constitute one "recording of the deed," for which the registrar is entitled to receive \$1 25c., and no more, unless all these necessary entries and certificates, adding also one certificate of registry, exceed on "counting folios" 800 words, when the statute gives an additional allowance for every additional 100 words.

We may suppose a case where a memorial (drawn concisely) of a conveyance of four lots in different townships of the same county, described only by the numbers and concession, would not require an entry in each township book exceeding four hundred words, dividing one certificate of registry between the four.

According to the argument urged for the registrar, he would be entitled to five dollars, *i. e.*, \$1 25c. for each entry in each book; but charging for all necessary entries for the recording of the deed at the rate of \$1 25c., he would be entitled to \$1 25c. for the first 800 words, and at the rate of $\frac{1}{100}$ for 800 words or eight folios more, making in all: \$2 37c., or less than one half of the claim set up on his behalf. In my humble judgment the latter mode of charge is what this statute contemplates and prescribes. In this case the demand is for five entries each, at \$1 25c.—\$6 25c. and 25 cents for going to the post-office to mail the deed after registry. We have nothing to do with this latter charge—it is not authorized by the statute. The other party offers \$1 25c. for the first 800 words, and at the rate of $\frac{1}{100}$ for every additional hundred words, in all \$4 50c. In my view this is correct as to the principle, they can settle the computation.

But though this is my construction of the act, and as we have heard the case argued, I have thought it as well to express it, I cannot agree to grant a rule for a *mandamus* on the materials before us.

The rule does not state that the lands are in the county of Simcoe, nor do either of the affidavits filed, nor is it shewn, except by belief, on a computation made, without having the memorial present how many words it contains; nor do the affidavits shew in how many townships the lands lie, though in a letter annexed to the affidavit, it is said, in five town-

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The rule does not state that the lands are in the county of Simcoe, nor does it state that the memorial is filed, nor is it shewn, except by the affidavits made, without having the memorial examined, and it contains; nor do the affidavits state the townships the lands lie, though it is said, in five town-

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ships, and nothing to the contrary being said, we may assume they are all in the county of Simcoe.

When the facts were opened on moving the rule, it never occurred to the court that the affidavits were so entirely defective, nor was it suggested during the argument, nor was any reliance placed on the objection, that a *mandamus* was not the proper remedy, but that the same course should have been followed as in *Smith v. Ridout*. If the delay caused the security to be worthless, the registrar or the party undertaking to procure the registry might be called upon to make good the loss.

Under these circumstances, I think we ought to discharge the rule, for we should discountenance such imperfect and hastily prepared applications; but as no objection has been made on these grounds by the registrar, it should be discharged without costs.

Per cur.—Rule discharged.

STURGESS V. BITNER.

Mortgage—Foreclosure—Cost of—How far recoverable as damages against the assignor when not allowed in Chancery.

Upon a foreclosure suit in Chancery upon a mortgage for £350, upon which only £250 had been in fact advanced, the court disallowed the additional £100, and the costs of the suit. The plaintiff (being the assignee of the mortgage) then claimed to recover these costs from the defendant, his assignor, upon his covenant for the validity of the security, &c. *Held*, not recoverable.

COVENANT on a mortgage dated 20th April, 1857, made between Thomas Howard and defendant, whereby, in consideration of £350 paid by defendant, Howard granted to defendant certain land subject to a proviso making the same void on payment by Howard of £350 and interest—£50 on 20th April, 1858, and on 20th April 1859, the sum of £300—in which deed it was recited that plaintiff had agreed to purchase of defendant the mortgage and the lands therein referred to for £350.

Habendum, the mortgage and the debt, subject to mortgagor's right to redeem, and by said indenture it was witnessed that the defendant, in consideration of £350, paid by

plaintiff, bargained, &c., to plaintiff, as well the indenture of mortgage, and the land therein described with the appurtenances and the covenants, sums of money, &c., due thereon, and defendant covenanted with plaintiff that the mortgage, on the 6th of October, 1857, was a valid security for £350, and that defendant had power to bargain, sell, &c., the said mortgage, &c., the lands, &c., unto plaintiff, and defendant authorized plaintiff to proceed with any suit then or thereafter to be instituted at law or in equity for the foreclosure of the mortgage in the name of the plaintiff or his assigns; and plaintiff averred that on said 6th October, 1857, the mortgage was not a valid security for £350, because as to £100 parcel of the said £350, there never was any consideration therefore from defendant to Howard, and that afterwards a suit being instituted in Chancery for the foreclosure of the mortgage, certain costs were incurred on bringing and defending said suit in Chancery amounting to £75, and which owing to the mortgage not being a valid security in pursuance of the defendant's covenant, plaintiff and his assigns were obliged to pay and did pay and so plaintiff says defendant hath not kept the covenant.

Plea.—That on 6th October, 1857, the mortgage was a valid security, and that plaintiff hath not, since the making of the deed, hitherto been damnified by reason of any thing in the deed mentioned.

The trial took place at London, in March, 1860, before *Richards, J.* Thomas Howard, the original mortgagor, was sworn, and stated that he mortgaged the premises as mentioned in the declaration in April, 1857, in reality for \$1000 but was to pay defendant twenty per cent. per annum for two years, and gave the mortgage (which was produced and shewn to him) for \$1400. The defendant's counsel endeavoured, and offered to prove, by cross-examination of this witness, that while one Neely was holder of this mortgage, Howard had paid him £50 on account of it, and that one Buckley, who afterwards became the assignee of the mortgage, refused to give him (Howard) credit for this £50, and that in consequence of this refusal he (Howard) set up the

defence of usury, which otherwise he would not have done, and therefore the security in reality was only diminished to the extent of £50. This evidence was tendered in mitigation of damages *pro tanto*.

The plaintiff further proved that a foreclosure suit was brought on the mortgage by one Buckley, who was plaintiff's assignee. The decree was put in, and it appeared thereby, that the defendant therein was only held liable to pay £229 15s. 5d. on the mortgage, less the defendant's taxed costs of that suit. It was proved the defendant's taxed costs were £22 9s. 3d., and the plaintiff's costs in that suit were taxed at £40 17s. 6d., which were disallowed. The £50 paid by defendant to Neely was also allowed. The learned judge held that this evidence was not allowable to increase the damages, but gave plaintiff liberty to move to add the £70 17s. 6., if the court considered the plaintiff entitled to it.

The plaintiff in fact received £250, and interest, at 5 per cent. from the date of the mortgage instead of £350 without interest, in April, 1859.

The jury found for plaintiff; damages £71.

In Easter Term, *McMichael*, for plaintiff, obtained a rule *nisi* to increase the damages by the sum of £62 10s., pursuant to leave reserved at the trial, on the ground that the damage proved amounted to that sum, and that plaintiff should at least have been allowed to recover his taxed costs in Chancery in addition to the verdict.

J. Wilson, Q. C., during the same term, showed cause. He cited *Mayne on damages*, 27, 28. *Short v. Kalloway*, 11 A. & E. 28.

DRAPER, C.J.—The whole question appears to be whether the plaintiff should be allowed to recover from defendant the costs of the Chancery suit to foreclose instituted against Howard.

I gather from the evidence that the suit in Chancery never would have been necessary, because Howard never would have withheld or resisted payment, unless a claim had been

set up to compel Howard to pay £50, which he had already paid to one Neely, an assignee and holder of the mortgage prior to one Buckley, who afterwards became the assignee, and for whose benefit, as we are told by the defendant's counsel, the suit in Chancery and this action were brought. But during the foreclosure suit it appeared that in truth only £250 was advanced, instead of £350, as was set forth in the mortgage deed, and the court, in disposing of the case only treated it as a valid security for £250, and interest at six per cent. from date, instead of a security for £300, payable without interest two years after date, and the court allowed Howard the taxed costs of his defence, allowing the plaintiff in Chancery no costs.

It appears to me this loss of costs was attributable to the unjust attempt to recover £50 which had been already paid. This is the substantial cause of the suit itself, and if so, of the consequences which have resulted from it. Altering the language of Lord Denman, in *Short v. Kalloway*, (11 A & E. 28) but preserving its spirit, we may say the plaintiff has no right to inflame his own account against another by incurring additional expense in the unrighteous attempt to enforce a demand he never ought to have advanced after the £50 was paid.

My opinion proceeds on the ground that a suit was brought with a view of obtaining a sum to which the plaintiff was not entitled, because he, or the party under whom he claimed, had already received it. That but for the insisting to recover the particular sum so claimed, Howard would have paid off the mortgage without dispute, and that the costs now sought to be recovered were thus incurred by the wrongful and unconscientious attempt of Buckley, for which plaintiff is responsible.

I think this view derives support, though indirectly, from the cases of *Walker v. Hatton*, 10 M. & W. 249, and *Smith v. Howell*, 6 Ex. 730.

The rule should be discharged.

Per cur.—Rule discharged.

EMERY V. IREDALE AND EMERY V. HODGE.

Invention—Patent—Description annexed to—Right of an inventor to claim each part in a combination.

Upon an action brought for the infringement of a patent for the manufacture of eavetroughs of tin or galvanized iron, the defendant pleaded 1st. Not guilty. 2nd. That at the time of the granting of the letters patent the supposed invention was not new as to the public use and exercise thereof, but had been and was wholly and in part publically and generally used, practiced and vended within Upper Canada before the date of the letters patent. The evidence proved the patent to have been a combination, partly of new and partly of old inventions. Upon a verdict for plaintiff and motion for a new trial.

Held, that a patent is good for a combination of old or before used inventions, as well as for an entirely new one, provided the patentee does not claim it as an invention new in all its parts, but merely for the improvement in the combination. 2nd. That it was not competent for the defendant, under these pleadings, to raise the question whether the combination was claimed as being new in all its parts, or merely a combination of before used inventions.

The declaration stated that plaintiff was the true and first inventor of a machine for the manufacture of eavetroughs of tin and galvanized iron, and by letters patent dated the 28th of November, 1857, which recited a petition of plaintiff, stating that he claimed to be the original inventor of a press for the manufacture of eavetroughs of tin and galvanized iron, not before his invention known or used in this province, and not in public use or on sale in the province with his consent as inventor, our lady the Queen, of her special grace, &c., did give and grant unto the plaintiff, during the term of fourteen years, the full and exclusive right and liberty of making, constructing, using and vending the said invention within the province, and the whole profit, benefit, advantage and commodity arising or accruing for or by reason of the said invention during the said term. *Habendum*, the said license, powers, privileges and advantages for fourteen years from the date of the patent, and her Majesty commanded all her subjects that during the said term they should not use or put in practice the said invention, or any part of the same, so allowed unto and invented by plaintiff without plaintiff's license, &c. Averment, that since the letters patent plaintiff has used the invention. Yet defendant, without the license of plaintiff, did work, use, exercise and put in practice the said invention, and did make and manufacture divers machines according to and by means of the said invention.

Second count for making and manufacturing, without plaintiff's license, machines intended to and which did imitate, counterfeit and resemble the said invention and divers parts thereof. Plaintiff claims damages, and a writ of injunction and an account.

Pleas—1. Not guilty. 2. That the supposed invention was not at the time of the granting the letters patent new as to the public use and exercise thereof, but had been and was wholly, and in part, publicly and generally used, practiced and vended within Upper Canada before the date of the letters patent.

The trial took place at the autumn assizes, 1860, in the city of Toronto, before *Richards, J.*

The plaintiff put in his patent corresponding with the statement of it in the declaration. The specification and description annexed to and set forth in the patent were as follows: "The press is intended to be of malleable iron or wood, and to be of different dimensions, so as to suit the sizes required for gutters or eavetroughs. To have a spindle for turning bead, according to letter A in the description of said machine, (there was a drawing of the machine annexed to the patent,) which spindle is capable of forming a bead inside, outside or square. B represented the eavetrough after being manufactured. The piece of tin or galvanized iron intended to be manufactured is first fastened to the spindle for turning the bead; the piece of tin or galvanized iron as aforesaid is then laid over that part of the machine marked with the figure 1, the same being open, and is pressed in the shape as shewn in the perspective view of the plan: whereupon that portion marked with the figure 2, to which the spindle is partly attached is closed down upon the sheet of tin or galvanized iron over figure 1, and the tin or galvanized iron is rebent over the back portion of that part of the machine marked with the figure 2, and thereupon that portion of the machine described upon the plan with the figure 3 is closed over the whole, and is pressed down by means of the lever attached to figure 3. The machine being then opened, the eavetrough is formed in the shape shown by letter B. What I claim as my invention is, that the eavetroughs manufactured

in the way proposed can be done with little labor. A boy, by means of it, being able to keep four or five men continually engaged soldering, and will do the work in the same given time that it now requires five or six men to do. The eavetroughs are now entirely manufactured by hand consequently a great deal of time is required in shaping them."

The patent concludes with a proviso that the same shall be wholly void if the description, drawing and specification (annexed thereto in pursuance of our statute) do not contain the whole truth relative to the invention, or if such description, drawing and specification contain more than is necessary to produce the desired effect, such concealment or addition appearing to have been made to deceive the public, or if the patentee be not the first inventor of the invention in the letters patent mentioned, or if the same was known in the province before the same was invented by the patentee, or before his application for the patent.

According to the evidence the use of a spindle for making the bead to these eavetroughs appears to have been generally known, and there was also proof that the giving the forms to the sheet of tin or galvanized iron, by pressure on a block cut into a proper shape, was in frequent use before plaintiff obtained his patent. But the spindle was used separately, and so were the blocks, and the pressure was applied in a wholly different manner. As was stated by one of the witnesses for the defence, he would be obliged to use three machines separately to produce the result which was obtained at once by the plaintiff's press. It was not denied that the combination of these modes of making the different parts of the eavetrough, or of making it step by step, was new, but it was contended that the plaintiff claimed the use of the spindle to make the bead, and the compression of plates into shape, as his own invention; and that inasmuch as these were things in public and general use before, the patent was void. It was proved that the defendant and his son came more than once to inspect the plaintiff's machine, while in the course of construction, and when in working condition, and made some suggestions; that the defendant talked of buying one from the plaintiff, and that he after-

wards got a machine made for the object which the plaintiff had in view, and copying a part from a machine which had been in use before the plaintiff obtained his patent, but which did not combine the spindle, nor was the O G part like the one which had been previously in use, and according to some evidence given on the plaintiff's behalf, this part was made on the principle of the plaintiff's machine, and there was some, though slight, evidence to go to the jury that the defendant had used it. The learned judge told the jury they must decide whether the plaintiff was the true inventor of the machine, and that the same was not known or used in this province by others, before the plaintiff's invention. That they must be satisfied that the defendant used, or made the machine so invented by the plaintiff. That if the machine seen at the defendant's was constructed from another in use before the plaintiff obtained his patent, or from improvements invented by the constructor, and not from instructions given by the defendant, it would not subject the defendant to liability. That the use must be a substantial use, not merely an experiment which failed. He further asked the jury to say if any part of the invention stated in the plaintiff's patent was in public use, *i. e.*, used publicly before the plaintiff obtained his patent, if so, to find for the defendant.

The jury found for the plaintiff, damages £15.

In Michaelmas term, *McMichael* obtained rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence, that the plaintiff's patent was void, because several parts of the machine were in common use before the patent was granted, and that the defendant had never made or used the machine, and could not therefore be guilty of an infringement of the patent.

R. A. Harrison shewed cause. He contended that the patent, as being a combination of inventions in use separately before, was good; that the specification claiming the invention as all new did not, because it was a combination of before-used inventions, render the patent void; that it was not necessary to use the word combination in the specification.

He cited Con. Stat. of Canada, ch. 34, sec. 3, 6, 7; Hindmarch, 124-5, 224; Bloomer v. McQuewan, 14 Howard. (U.S.) R. 539; Boulton v. Bull, 2 H. Bl. 463, 487; Hornblower v. Boulton, 8 Term R. 95; Curtis on Patents, sec. 24, 25, 93, 94, 109, 110; Newton v. Grand Junction Railway Company, 5 Ex. 331; Sellers v. Dickinson, 5 Ex. 312; Winans v. Denmead, 15 Howard, 330; Lister v. Leather, 3 Jur. N. S. 811 Q. B.; S. C., 27 L. J. Q. B. 295; and 8 E. & B. 1004; Bovill v. Keyworth, 7 E. & B. 725; Bateman v. Gray, 8 Ex. 906.

McMichael, in support of the rule, referred to Con. Stat., ch. 34, sec. 4, 6, 7, 8, 22, 27, sub-sec. 2; Hindmarch 184; Tetley v. Easton, 2 C. B. N. N. 706; Branton v. Hawkes, 4 B. & Al. 549; Lister v. Leather, 8 E. & B. 1004; Perry v. Skinner, 2 M. & W. 471. He contended that different parts of the machine being old and before used, the patent was void. He further argued that the specification is part of the patent under our statute, and that it must state the machine correctly—Hill v. Thompson, 8 Taunt 375. The Patent Bottle Envelope Company v. Seymer, 5 Com. B.N.S. 164; Tetley v. Easton, 2 E. & B. 956; Campion v. Benyon, 3 B. & B. 5; Gibson v. Brand, 4 M. & G. 179; Minton v. Mower, 6 A. & E. 735.

Harrison, contra, cited Bush v. Fox. 5 H. of L. Cases 707.

DRAPER, C. J.—Upon the evidence, I think it sufficiently established that the plaintiff has invented “a press for the manufacture of eavetroughs of tin and galvanized iron,” as set forth in his patent, and that such invention, viz., the press, is new and useful, and the proper subject of a patent.

If this press, which consists of several parts, was in each part, and in its aggregate, new, or if each separate part had been previously used, but the press itself as a combined whole was new, in either case there would be a new machine or manufacture, the proper subject of a patent.

The objection raised on the defence is, that some of the parts are not new. For example, the spindle used to put on

a bead to the tin or galvanized iron plate of which the eavetrough was to be constructed, and the block, shaped so that by beating the tin or iron plate upon it, the requisite shape designated as the O G was given to such plate, and the use of pressure, instead of beating, to force the plate upon the block and so to receive the shape desired, were proved to have been known and used before. And it was urged that the plaintiff had claimed as his invention, not simply a new press which combined these well known parts and processes into one, but a press, new as a whole, and new in all its parts also, and that the patent is therefore void because the parts, or at least some of them, are not new, and that it would be as much an infringement of the patent to use one of these as to make and use the complete press mentioned therein.

There certainly was evidence that a spindle was used to form a bead, and that blocks, convex and concave, were used to give a part of the O G form to tin or iron plates, and that a perpendicular pressure was produced by a machine, working with a crank in a frame, up and down, all before the plaintiff obtained his patent. And I think that if any of these matters are separately claimed by the plaintiff, as well as the combination of them, and are patented to him as new inventions, the patent is void. This consequence does not follow because the different parts uncombined were in use before, but because the plaintiff has claimed to be the inventor of them, when the contrary was the fact, and so the Crown is deceived as to part of the consideration for granting the patent, namely, the novelty of all of which the plaintiff claims to be the inventor; otherwise, as Lord C. J. *Abbott* (*Brunton v. Hawkes*, 4 B. & A. 550) says, "a patent for a machine, each part of which was in use before, but in which the combination of the different parts is new, and a new result is produced, is good, because their is a novelty in the combination," and though the specification had remained as it is, if the plaintiff had limited his claim to the really new part of it, it would be, if useful as well as new, the subject for a valid patent.

The two questions then are: 1. On a fair construction of

the patent, is it open to the objection taken. 2. If it be, is the objection open to the defendant upon these pleadings.

With regard to the first question, I think the case of *Holmes v. The London and North Western Railway Co.*, 12 C. B. 831, affords a complete answer. I may say, as was said by *Maule, J.*, in that case, "without looking out of the specification it appears to me to be manifest that the patentee claims as his invention the whole of what he is describing," and this is confirmed by the evidence of the plaintiff's first witness (his son,) who evidently considered that the whole invention belonged to the plaintiff. In the same case, *Jervis, C. J.*, states the general proposition, "that a patentee must in his specification, correctly describe the nature of his invention, or in such a manner that a person of ordinary understanding may, on reading it, see what is claimed as new and what is old," and "that a patent may be obtained for a combination of known instruments or parts, provided it is properly described."

I think it quite clear that in this case the patentee makes no distinction between what is new and what is old, and though I do not doubt that the press for which the patent is granted, is, as one aggregate thing, a new invention, it is composed of several parts not new, and the specification sets forth the parts which are not new, together with the parts and combinations which are new, and makes no distinction between them. The claim of the plaintiff, as inventor, applies apparently as much to the one as the other.

As to the second question, I have felt more doubt, but I have formed the opinion that the objection is not open to the defendant on these pleadings. In the case just referred to a very similar question arose. There, to an action for infringing a patent the defendant pleaded, 1st. Not guilty. 2nd. That the patentee was not the true and first inventor. 3rd. That the alleged invention was not new. 4th. That the patentee did not in and by the instrument in the declaration mentioned (the specification I presume) particularly describe and ascertain the nature of the alleged invention, and in what manner the same was to be and might be performed. The

court, in deciding against the plaintiff, on the ground that the plaintiff claimed more than he was the true and first inventor of, held that the verdict should be entered for the defendants on the fourth issue only, and not on the issue joined on the plea of novelty. Taking this case in connexion with that of *Bateman v. Gray*, 8 Exch. 906, I have arrived at the conclusion already expressed, and think that this rule should be discharged.

Boulton v. Bull, 2 H. Bl. 463; *Boulton v. Bull*, 3 Ves. 141; *Hornblower v. Boulton*, 8 T. R. 95; *Newton v. Grand Trunk Railway Company*, 5 Exch. 333; *Sellers v. Dickinson*, 5 Exch. 312; *Hill v. Thompson*, 3 Mer. 629; *Booth v. Kennard*, 2 H. & N. 84; *Bovill v. Keyworth*, 7 E. & B. 725; *Lister v. Leather*, 8 E. & B. 1023; *Platt v. Elso*, 8 Exch. 364; *Burnett v. Smith*, 13 M. & W. 552; *Bedells v. Massey*, 8 Jur. 808; *Hancock v. Noyes*, 9 Exch. 388; *Croll v. Edge*, 9 C. B. 479; *Thomas v. Foxwell*, 6 Jur. N. S. 271; *Harrison v. G. W. Railway Company*, Ib. 993.

HAGARTY, J.—I do not see any foundation for the defendant's argument as to the issues on this record that we are not to be governed by the law as laid down in *Bateman v. Gray*, because by our statute, *Consol. Statute, Canada*, ch. 34, sec. 7, sub. 5, a copy of the specification is in all cases to be annexed to the patent, and that a drawing, whenever the case admits of drawings, shall be annexed to the patent, and considered a part of the specification thereof. Neither of the imperial acts 5 & 6, Wm. 4, ch. 83, or 15 & 16 Vic., ch. 83, contains such a direction, but merely certain directions as to enrolling the specifications, &c.

Mr. Hindmarch, p. 158, speaks of the specification as being considered incorporated in the patent, and quotes the words of *Grose, J.*, in *Hornblower v. Boulton*, 8 T. R. 102: "I consider the patent and specification so connected together as to make a part of each other, and that to learn what the patent is I may read the specification and consider it as incorporated with the patent."

I do not see how the direction in our statute, as to annex-

ing a copy, can introduce any different rule as to pleading objections to the specification.

The difficulty chiefly pressing me here is just that described by *Alderson, B.*, in *Bateman v. Gray*, 8 Ex. 909: "The difficulty which presses us here, is that although the plaintiffs may have invented a useful machine, they have not properly described it." There the pleas were,

1st. Not guilty. 2nd. That plaintiff is not the first and true inventor. 3rd. That the alleged invention is not an invention of any manner of new manufacture.

In the case before us the pleas are 1st. Not guilty. 2nd. That the supposed invention was not new as to public use, &c., but had been wholly and in part publicly used, &c. 3rd. That plaintiff was not the true and first inventor, &c.

In *Bateman v. Gray*, the objection was that the specification did not contain a claim for a combination, and that plaintiffs were bound by the description. (The plaintiff had sworn that his invention consisted in the combination of the three different matters described in the specification, and that he did not claim them separately.)

The court decided, "We think that what was the invention was a question for the jury, and that the production of the specification did not conclude it. * * The real and true objection which was open to defendant was that the plaintiff had not complied with the condition of the patent by truly and correctly describing it in the specifications which he had filed. But this could only be taken advantage of by a plea to that effect."

It is quite true that in this case the specification, besides being annexed, is almost wholly incorporated in the patent itself, all the descriptive part being literally copied. Some of the remarks in *Bateman v. Gray*, may be urged to show that there the specification need not have been given in evidence—here it is necessarily in evidence, being incorporated in the patent itself, and a traverse of the novelty of the invention means the invention as described in the patent.

I still think that an objection of the nature now urged, viz: "That the different parts of the machine having been all, or some of them, in use, &c.; the patent not having been

taken for combination simply, was void," should have been the subject of a plea raising that issue, that is, of course assuming that such an objection would be valid if properly taken.

Our statute does not require the specification to be incorporated in the patent. In this case it is nevertheless made part of it by the act of those issuing the patent.

The English patent contained the usual condition that the patentee should in six months from date enrol a specification "particularly describing and ascertaining the nature of the said invention, and in what manner the same was and might be performed."

The patent before us refers to the specification, and recites its material parts, and declares that "a full description, drawing, and specification are to these presents affixed, and hereby made part of these presents," and a proviso is attached for avoiding the grant if the same do not contain the whole truth relative to the said invention or discovery, or if they contain more than is necessary to produce the desired effect, such concealment or addition appearing to have been made to deceive the public, or if the patentee be not the first discoverer or inventor, or if the same was known or in use in the province before being invented by the patentee, or before his application for the patent.

In this case the declaration avers that the plaintiff was the true and first inventor of a machine for the manufacture of eavetroughs of tin and galvanized iron. That a patent had issued to him reciting his claim to be the original inventor of a press for the manufacture of eavetroughs of tin and galvanized iron, and granting to him the exclusive right to "the said invention, and charging that defendant did work, use, and put in practice the said invention, and did make certain machines according to and by means of said invention, and in breach of the said patent therefor."

The defences set up (with not guilty) deny that said invention was new, but that it had been and was wholly and in part publicly used, &c., and traverse the allegation of plaintiff being the first inventor, &c.

It certainly appears to me that on such issues the objec-

tion raised in this rule, that the patent was not taken for a combination solely is not open to defendant.

The plaintiff claims to have invented a machine or press. The jury were told by the learned judge, that if the combination carried out in this machine was the invention of plaintiff, and not known or used in Upper Canada, then they should find for plaintiff, which they accordingly did, as I think the evidence fully warranted.

We are now to say if the plaintiff—clearly shown to be the inventor of a useful and novel machine for effecting a result in manufacture which formerly could only be done by hand or by certain mechanical powers operating separately to form the different parts of the eavotrough—is to lose the benefit of his ingenuity for any technical defect or omission in the specifications filed.

The 26th section of our (Consol. Stat. of Canada, ch. 34) patent law declares that “whenever plaintiff fails to sustain his action on the ground that in his specification of claim is embraced more than that of which he was the first inventor or discoverer, or if it appears that defendant had used or violated any part of the invention, justly and truly specified and claimed as new, the court may adjudge and award, as to costs, as appears to be just and equitable.”

Sec. 27. That the “defendant in any such action may specially plead any matter of defence thereto, specified in this act, or in any former law under which the patent was granted.

Sub-sec. 2. “And if at the trial of any such action it is made apparent to the satisfaction of the court (the defendant having specially pleaded the same) that the specification filed by the patentee does not contain the whole truth relative to the invention or discovery to which it refers, or that it contains more than is necessary to produce the described effect, (such concealment or addition fully appearing to have been made for the purpose of deceiving the public,) or that the thing thus secured by the patent was not originally discovered by the patentee or party claiming to be the inventor or discoverer in the specification referred to in the patent, but had been in use or had been described in some public

work, &c., or that he had surreptitiously obtained a patent for the invention or discovery of another person, in either of the said cases judgment shall be rendered for the defendant, with costs and the patent shall be declared void."

Under the 18th section large powers of disclaiming are given to a patentee who in good faith by mistake, accident, or inadvertence, has made his specification too broad, claiming more than that of which he was the original inventor, some material and substantial part of the thing patented being truly and justly his own, or has in the specification claimed, *to be the original and first inventor of any material or substantial part of the thing* patented of which he was not the first inventor, &c.

This disclaimer he may file in the proper office, and thereafter shall be taken as part of the original specification, &c., and the patent shall be good for so much of the invention as is truly his own and is not disclaimed, and he may maintain an action for infringement of so much as is truly his own, notwithstanding such disclaimer or larger specifications. But in case of judgment in his favor he shall get no costs against defendant, unless he has entered his disclaimer in the office of the Minister of Agriculture, and no person bringing such action shall have the benefit of those sections who has unreasonably neglected or delayed to enter in the said office the said disclaimer. By sub-sec. 5, the disclaimer shall not affect any action pending at the time of its entry, except so far as relates to the question of unreasonable neglect or delay in filing the same.

From a consideration of all these provisions it appears to me that the question stands thus. The defence, of too large a specification, and that plaintiff claims more than is really novel, &c., is made a ground for avoiding the patent altogether under the statute, and such a bar to the right of recovery must be specially pleaded. The 27th section expressly requires any of the defences of that kind to be specially pleaded.

A plaintiff met by a plea of that kind has at once notice of the objection to his specification. He may, as I believe was the case with this plaintiff, have in good faith made the

specification as broad as it is, firmly believing that he was the original inventor not only of the machine patented, but of all its parts. On enquiry he may find that certain essential portions are not new, and he may be advised at once to discontinue his action and avail himself of the power of disclaimer, so liberally allowed by the statute.

But it appears to me to be alike repugnant to the spirit of the act and to the object of all rules of pleading, to allow a defendant to raise such an objection under issues such as are on this record.

I incline against the sufficiency of the specification, if the defence were open to defendant.

A mechanic who for the first time had seen or heard of any machine for the complete or partial manufacture of eave-troughs according to plaintiff's specification might, I think, be naturally led to believe that plaintiff claimed the parts No. 2 and 3, as parts of his invention, and be deterred from their use.

Coleridge, J., says, in *Tetley v. Easton*, 2 E. & B. 968: "If a specification includes what is old as well as what is new, the patentee must be taken to claim all, unless he clearly makes it appear he does not claim that which is old. If a hinge be mentioned, it would be absurd he should point out the hinge as not new."

In *Lister v. Leather*, in error 8 E. & B. 1034, *Williams, J.*, delivering judgment, says: "Neither a claim nor a disclaimer is essential to a specification—that which appears to be the invention, or a part of it, will be protected though there be no claim, *and those matters which manifestly form no part of the invention need not be disclaimed.*"

Now applying this explicit language to the present case, I cannot say that parts 2 and 3 of this machine "manifestly form no part of this invention." The combination is new, but these parts are proved to be in use for the effecting of certain parts of the work which the plaintiff has succeeded in doing by a machine combining these several mechanical actions.

I do not agree with *Mr. McMichael* that the non-disclaimer of a well known mechanical contrivance like "a spindle"

would vitiate the specification, and Mr. Justice *Coleridge's* illustration of "the hinge," supports this view.

I think the plaintiff will do well to notice the suggestions made by the court at the end of the case of *Bateman v. Gray*, 8 Ex. 912.

I think the rule should be discharged.

Per cur.—Rule discharged.

See as to pleading, *Platt v. Else*, 8 Ex. 364; *Hancock v. Noyes*, 9 Ex. 388. *Generally*, *Holmes v. London & N. W. R'y Co.*, 12 C. B., 831; *Croll v. Edge*, 9 C. B. 479; *Reg. v. Mill* 10 C. B. 380.

BARRAGAN V. SHERWOOD, ESQ. (SHERIFF.)

Trespass—Plea of not possessed—Jus tertii.

In an action of trespass against the sheriff for wrongfully seizing goods and converting them, &c., pleas not guilty, and not possessed, the evidence shewed that plaintiff was *actually* in possession, though in fact a trespasser.

Held, that defendant, under the plea of not possessed, is not entitled to set up the right of property in a third party without either express or implied authority from such third party.

1st count, for wrongfully depriving the plaintiff of the use and possession of 1,000 cords of wood of plaintiff.

2nd. For converting to his own use the same goods.

Pleas 1.—Not guilty. 2. Goods not the plaintiff's. 3. Judgment recovered in Queen's Bench, on 23rd April, 1860, by one George Morton, against one William Hanlon, for \$166 75c. in trespass, and a *fi. fa.* thereupon directed to defendant, commanding him to levy the said sum of the goods and chattels of Hanlon, endorsed to levy £22 2s. 6d. damages, and £19 11s. 3d. costs, with interest, &c., by virtue whereof defendant seized the goods mentioned in the declaration, being the goods of the said Hanlon. 4th, to first count, that plaintiff and Hanlon were jointly possessed of the said goods as their own, that George Morton recovered the judgment stated in the foregoing plea and issued the writ, which was delivered to defendant, by virtue whereof, in order to levy the damages of one undivided moiety of the goods, did seize and take the said goods for that purpose. 5. A similar plea

to the first count, stating the goods to have been jointly owned by plaintiff Hanlon and one Michael Barragan. Issue on the first and second pleas. Traversing statement in third plea that the goods were Hanlon's. Traversing the joint ownership of Hanlon stated in the fourth, and of Hanlon and Michael Barragan stated in the 5th plea.

The issues were tried in October, 1860, at Brockville, before Sir J. B. Robinson, C. J. The plaintiff gave sufficient evidence to shew himself *prima facie* the owner of certain cord wood on lot No. 20, in the ninth concession of South Crosby, proving that it was chopped for him in order to fulfil a contract he had made with one Noble, who had a contract to supply cordwood to the penitentiary. He proved by Hanlon and Michael Barragan, named in the 3rd, 4th and 5th pleas, that they were working for plaintiff, and had no interest or property in this timber.

The seizure by the defendant was proved by shewing that a bailiff in his employ seized it under the writ of *fi. fa.* stated in the pleas, the bailiff having a warrant to execute that writ. It was also shewn that soon after the seizure the plaintiff gave notice of his claim to defendant, who obtained an interpleader summons, which was afterwards discharged on the ground of delay. The sheriff, some considerable time after this, gave the plaintiff notice that he had abandoned the seizure. The plaintiff also proved a lease to him of this lot from one Sophia Williams, with leave to cut timber. Her title was not shewn.

On the defence some evidence was given to contradict plaintiff's witnesses, and to show by their own statement, but more particularly by Hanlon's, that he and Michael Barragan were interested in this timber. But the principal ground of defence was that the lot of land had many years ago been sold by the sheriff for taxes to one Spafford, since deceased, and that there had been subsequent calls for taxes on parts of the same lot. That the plaintiff was consequently a trespasser in cutting this timber, which the owner of the land afterwards allowed Morton, named in the plea as the execution creditor, to take away. It was objected that it was not competent to the sheriff who was not acting in privity

with the alleged owners of the land, but was, if they were the owners, a wrong-doer even as to them, to set up the *jus tertii* against the plaintiff, but the learned Chief Justice overruled the objection.

The learned Chief Justice asked the jury to say what damage the plaintiff had sustained by what the sheriff did, supposing that the wood belonged to the plaintiff? 2. Whether the plaintiff at the time was the owner of the wood which was seized in his possession? If they found plaintiff was not the owner, the Chief Justice stated that he should reserve leave to the defendant to move to have a verdict entered in his favor upon the issue on the second plea, or a verdict entered for nominal damages only as the court might think fit, expressing his opinion that the 3rd, 4th, and 5th pleas were not proved. The jury, however, gave a general verdict for the defendant.

In Michaelmas Term, *O'Reilly* (of Kingston) obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection and the receipt of improper evidence, and on affidavits.

In Hillary Term, *Senkler* shewed cause. He argued that this action was to be governed by the same rule as if both counts were in *trover*, and that as framed they might be so treated, in which case the plaintiff could only recover very small damages, for the evidence shewed the wood was not his property—that he was a trespasser in cutting it—citing *Mayne on Damages* 214; *London and Westminster Loan Company v. Drake*, 5 Jur. N. S. 1407, per *Willes, J.*

He next contended that the evidence objected to was properly received under the second plea, and cited *Chase v. Goble*, 2 M. & Gr. 930; *Gadsden v. Barrow*, 9 Ex. 514; *Leake v. Loveday*, 4 M. & Gr. 972.

O'Reilly (of Kingston) contra, cited *Jeffries v. G. W. Railway*, 5 E. & B. 802; *Heath v. Milward*, 2 Bing. N. C. 98; *VanToll v. Wall*, 1 F. & F. 504; *Wilbraham v. Snow*, 2 Saund 47.

DRAPER, C. J.—The only question we have to dispose of

arises on the plea of not possessed. On not guilty the plaintiff proved his case, and the evidence certainly, as was observed by the learned Chief Justice at the trial, did not prove the third, fourth or fifth pleas.

The plaintiff was in possession of the goods at the time the defendant took them, under a writ of *feri facias* against one Hanlon. I agree with Mr. *Senkler* that both the counts in the declaration are counts in *trover*, and that if the plaintiff had been out of possession, as in *Leake v. Loveday*, on which Mr. *Senkler* relied, a different rule would have prevailed. But I think *Newnham v. Stevenson*, 10 C. B. 713, and the same case in error, 13 C. B. 285, shew that where the wrong doer, which the sheriff was in this case, takes goods out of the possession of the plaintiff, he cannot, under the plea of not possessed, set up the right of property in a third person, without shewing he is acting by his authority express or implied. We considered the same question, though under different circumstances, in *Ruttan v. Beamish*, 10 C. P. U. C. 90, and came to the same conclusion. If the jury had found as they were requested to do, a verdict on the first plea for the plaintiff, with such damages as they thought him entitled to on a view of all the circumstances, we could have disposed of the case, although they found for the defendant on the plea of not possessed, notwithstanding our opinion as to the setting up the *jus tertii* without granting a new trial, but not having done that, we cannot let a general verdict for defendant stand.

I think therefore there must be a new trial without costs.

Per cur.—Rule absolute.

JOHN GRANT QUI TAM V. MOSES McFADDEN, Esq.

Magistrate—Return of Conviction—Notice of action against—Con. Stat. U. C., ch. 126.

In an action against a magistrate for the penalty given by the statute (Con. Stat. U. C., ch 124) for having neglected to make an immediate return of the conviction of one J. S.

Held, that one month's notice before action under Con. Stat. U. C., ch. 126; sec. 9 and 10, not necessary.

The declaration stated that an information having been laid against one John Leng, and the defendant and W. S.,

and J. R. F., three of Her Majesty's justices of the peace, having adjudicated on the causes of complaint in the said information, afterwards on the 5th July, 1860, at Elma, in the said county of Porth was (*sic.*) convicted before the defendant and W. S. and J. R. F., being such three justices of the peace for the said county, for that the said John Leng did, on, &c., (stating an assault and battery of plaintiff,) and adjudged the said John Leng for his said offence to forfeit \$8 and to pay plaintiff \$10, for his costs in that behalf, and if those sums were not paid, that the said John Leng should be imprisoned for twenty days, unless the said sums and the costs of taking the said John Leng to goal should be sooner paid, whereupon it became defendant's duty to make an immediate return of the said conviction according to the statute, yet defendant did not, nor did the other justices or either of them make an immediate return of the said conviction, whereby an action hath accrued to the plaintiff, who sues as well, &c., to recover \$80.

Pleas 1.—Not guilty. 2. Not indebted.

The case was tried at Stratford in October, 1860, before *Hagarty, J.* It was proved that the defendant, with two other justices of the peace as stated in the declaration, made the conviction therein set forth in July 1860. The information had been laid on the 14th June, before another magistrate, who summoned the accused, and appointed a meeting at a particular place. On going there at the appointed time, he found defendant and the two other justices. They heard the case all together, but the summoning justice did not concur in the conviction made. The complainant, the now plaintiff, gave immediate notice of appeal, and at the following quarter sessions the conviction was quashed. On the 10th September, 1860, after the action was commenced, this conviction, dated 5th July, 1860, was delivered by defendant to the clerk of the peace. A return of the conviction was sent to the clerk of the peace on 14th September. The quarter sessions met on the 11th September, and adjourned to the 18th, when the appeal was heard, both parties having appealed, and the conviction was quashed.

The defendant's counsel objected that it did not appear

the justices were requested to proceed summarily, or that the parties were brought before them. That it was not alleged that the assault was unlawful, either in the information or conviction; that the disposition of the fine was unlawful; that it should have been directed to be levied by distress; that the conviction does not recite the information or the summons issued, or the appearance, or set forth any evidence; that when a conviction is appealed against, the statute does not apply; that no notice of action to defendant was proved, and that the return to the Court of Quarter Sessions was sufficient. Leave to move for a nonsuit on the last three objections was reserved.

The learned judge left the case to the jury on the question whether the defendant had made an *immediate* return. They found for plaintiff. It was further objected that the learned judge told the jury that the fact of notice of appeal having been immediately given should not be considered by them.

In Michaelmas Term, *S. Richards* Q. C., obtained a rule *nisi* for a new trial for misdirection, or to enter a nonsuit on the leave reserved.

A. Crooks showed cause, citing *Kelly qui tam v. Cowan*, 18 Q. B. U. C., 104; *Murphy qui tam v. Harvey*, 9 C. P. U. C., 528; *O'Reilly qui tam v. Allan*, 11 Q. B. U. C., 411. Upon the point of notice he referred to Consol. Stat. of Upper Canada, ch. 126, sec. 10. *Wright v. Horton*, Holt N. P. C. 458; *Morgan v. Palmer*, 2 B. & C. 729.

In the following term *S. Richards*, Q. C., supported his rule. He addressed himself particularly to the objection of want of notice of action, contending that this was a case within the 9th and 10th sections of the Consol. Stat. U. C., ch. 126. He cited *Davis v. Curling*, 8 Q. B., 286; *Joule v. Taylor*, 7 Exch. 58, and urged that under those cases the court might view the non-return of the conviction as amounting to proof of his acting in the discharge of his office of magistrate, and so might come within the words, "anything done by him in the execution of his office," in which case he was entitled to notice.

DRAPER, C. J.—I think this case clearly distinguishable from those cited by Mr. *Richards*. It is an action for a penalty, the foundation of which is, that the defendant has disobeyed the plain provisions of the statute requiring him to make a return of the conviction. It is not a wrong to the plaintiff individually, which is the cause of action, and where that wrong might be deemed, even though an omission, something done in the execution of the office, but it is a breach of a duty prescribed by law, for which a punishment by way of penalty is inflicted. *Charlesworth v. Rudgard*, 1 C. M. & R. 896, appears to me to decide this case, and *Wright v. Horton* (Holt N. P. C. 458) is the same in effect.

I think the rule should be discharged.

Per cur.—Rule discharged.

HUGH FRASER AND MATTHEW CROOKS CAMERON 'V. JOHN GLADSTONE AND ALEX. MORRISON.

Assignment—Registry of—Consideration in—How far necessary to shew the consideration in the registered instrument.

Held, that an assignment (registered under the statute) for the money consideration of five shillings, with a separate declaration of trust referred to and forming part of the instrument (not registered) was invalid, and that the conveyance registered must shew the true and full consideration for which it is given. The decision in *Arnold v. Robertson*, 8 C. P. U. C. 147, affirmed.

INTERPLEADER issue to try whether certain goods taken in execution by the sheriff of York and Peel on a *fiery facias* delivered to the sheriff on 1st March, 1859, in a suit brought by defendant, against one John Hutchison, were the property of the plaintiffs as against the defendants.

The trial took place at Toronto in April, 1860, before *Hagarty, J.* John Hutchison named in the interpleader order, was the only witness called. He produced and proved an assignment dated 28th December, 1857, made by himself to the plaintiffs, whereby, after reciting that he was indebted to the plaintiffs, and to divers other persons that he was unable to pay, and being desirous of having his estate and effects applied for the benefit of his creditors, had agreed to make a general assignment to the plaintiffs, upon the trusts

contained in a certain other indenture of assignment of the same date, made between the same parties, and the creditors of him, the said Hutchison, who became parties to the said assignment within two months from its date, and that for the more convenient filing according to law of the assignment of the goods, chattels, and household furniture, of the said John Hutchison assigned to the said parties of the second part, for the benefit of creditors upon the trusts contained in the other indenture, he had agreed to execute the bill of sale of his goods, chattels, and household furniture, in and about the dwelling-house and premises occupied by him, in &c., and mentioned in schedule annexed marked A. B. and C. It was witnessed that in consideration of the premises and of the trusts and release in the other indenture, and of 5s., he granted, &c., unto the plaintiffs, the goods, &c., described in the schedules A. B. and C.

Habendum to the plaintiffs upon the trusts contained in the other indenture. This indenture was filed in the office of the clerk of the county court on 27th December, 1857. The witness stated that the household furniture still remained at his house; that a great number of his creditors had executed the other assignment; that about £27,000 had been paid to the creditors. All the creditors for sums under £60, and all accommodation paper had been paid, and three dividends to general creditors; that his assets were estimated at £100,000, and his debts at £50,000; that he was allowed to draw a salary of £500 per annum, but had not drawn so much; that he attended to the business and received and paid moneys; that after all the creditors who had signed were paid, he was to receive the balance; that a considerable part of his real estate was mortgaged, and the mortgage creditors were paid with the others.

Various objections were raised on the defence, but it is only necessary to notice one, namely, that this assignment, which is the only one filed according to law, contains no trusts, but is declared to be upon the trusts set forth in another indenture not filed; that the trusts contained in that other indenture form part of the consideration for this, and there-

fore that this assignment is void according to the decision in *Arnold v. Robertson*, 8 C. P. U. C., 147.

The learned judge expressed his opinion to that effect and it was agreed that a verdict should be entered for the defendants, with leave to the plaintiffs to move to enter a verdict for them.

In Easter Term last, *M. C. Cameron*, obtained a rule nisi on the leave reserved.

In Hilary Term, *Eccles Q. C.*, shewed cause.

M. C. Cameron contra.

DEAPER, C. J.—I have heard nothing to distinguish this case from *Arnold v. Robertson*, (8 U. C. C. P. 147,) and therefore think it unnecessary to say more than till that decision is overruled, we ought in my opinion to be governed by it.

Per cur.—Rule discharged.

JOHN WILSON V. JEREMIAH WEST AND JANE WEST.

Slander—Husband and wife—Nonsuit.

On an action brought against a husband and wife for slander, the declaration alleged the words constituting the slander to have been spoken by both the defendants, while the evidence proved the wife alone to have made use of the words complained of. On motion for nonsuit, *Held*, that the declaration should have alleged that the action was brought against the defendants for words spoken by J. W., being the wife, &c., and that it was not therefore supported by the evidence.

This action was brought against the two defendants as husband and wife, for slander addressed by defendants to a grand-daughter of the plaintiff, in this words: "Your grandfather was nothing but a saddle thief," *inuendo* that he stole a saddle.

Plea.—Not guilty.

The case was tried at Belleville in November, 1860, before *Burns, J.* The plaintiff proved the speaking of the words charged by the defendant, Jane West, but not by the defendant Jeremiah, nor was he present when they were spoken. The learned judge was of opinion that as the two defendants were admitted to be man and wife, and as he must be sued jointly with her for words spoken by her, the evidence

was sufficient to go to the jury, in support of the declaration. The jury found for plaintiff—damages £34.

In Michaelmas Term, *Sisson* obtained a rule *nisi* to arrest the judgment, or for a new trial for misdirection.

In the following term, *S. Richards*, Q. C., shewed cause. He asked leave to amend by stating that the defendant Jane, being the wife, &c., spoke the words. He said there was an application made at the trial to amend, to which the learned judge assented. He cited *Parsons v. Alexander*, 5 E. & B. 263, and *Wilkinson v. Sharland*, 11 Exch. 33, in support of the power of the court to amend now.

Sisson, contra, said the plaintiff's counsel chose to rely on his declaration, after a nonsuit had been moved for and pressed, the learned judge apparently inclined in favor of the plaintiff. He contended the evidence did not support the declaration, and that after declining to ask for or take an amendment, the court would not grant an amendment now. He cited *Doe Ausman v. Munro*, 1 U. C. Q. B. 277; *Doe v. James*, 4 U. C. Q. B. 490; *Rischmuller v. Uberhaust*, 10 U. C. Q. B. 612; *Serjeant v. Chafy*, 5 A. & E., 354; *Selwyn N. P.* 298 (10th ed.)

DRAPER, C. J.—I have some doubt if we should arrest the judgment, on the ground that if both spoke the words there must be two actions, one against the husband alone for the words spoken by him, the other against the husband and wife for the words spoken by her. Because if any evidence will sustain the declaration against the two charging words spoken by both, we should intend such evidence after the verdict, and on a motion to arrest judgment. Suppose the two defendants to have spoken these words alternately: "John Wilson stole a new saddle." The husband saying, "John," the wife, "Wilson," and so on, the husband will have said "John stole new." The wife, "Wilson, a saddle." Neither of the two has gone far enough to give a cause of action, but the combined words spoken by both charge a felony. But there are many cases in which the language is quite general and explicit enough to warrant the contrary

position. In *Maitland v. Goldney*, 2 Ea. 426, the action was sustained against two defendants upon an affidavit severally made by them, and containing separate statements, but to the same purport by each, though it may be said there was a joint publication; and the cases after all decide no more than that when two or more persons commit distinct wrongs, several actions must be brought against them. But the evidence establishes the words to be spoken by the wife in the absence of her husband, and the question is, do they support the declaration as framed? In my opinion they do not, for I take the declaration to charge a wrong in the committal of which both join. If both cannot join in such a wrong, then the declaration would be bad. If both can, then the declaration is framed precisely to meet such a case, and then the proof is of a wrong committed by the wife, for which the husband because he is husband, and not because he is a joint *tort feasor*, is responsible.

To grant a new trial for misdirection on this point would be of no avail to the defendants, because in the event of another trial the plaintiff, upon some terms or other, would obtain leave to amend.

On referring to the learned judge we find that the substantial merits of the case have been tried; but as an amendment has become necessary, owing to the plain error in the declaration, we think it better to allow the plaintiff to amend the declaration, on payment of the costs of this application, and thereupon the rule should be discharged, the plaintiff taking out his rule to amend and paying the costs within one month, otherwise there must be a new trial without costs.

Per cur.—Rule accordingly.

See *Barnard v. Gostling*, 2 Ea. 573; *Swithin v. Vincent*, 2 Wils. 227; *Dy*, 19a, Palm 313; *Chamberlain v. White et al.*, Cro. Jac. 647; 1 Bulst 15; 1 Roll. Abr. 781; 2 Vin. Ab. 64, Pl. 27.

CAVIE RICHARDSON AND SARAH ANN HIS WIFE V. RICHARD TRINDER.

Lease—Inchoate purchase of land—Possession—Crops.

S. A., before marriage to C. R., her present husband, (on the 1st of April, 1857,) leased certain lands to the defendant by the year, one third of the yearly crop to be paid as rental. To a declaration claiming the non-delivery of the crop as agreed, defendant pleaded, thirdly, that on 17th April, 1860, the lands in question were sold under Chancery sale to one D., who paid his deposit and signed a memoranda, and thereby became entitled and entered into possession, and took and converted one third of the crop to his own use, whereby he, defendant, was prevented from furnishing the same.

Held, that D. being only an inchoate purchaser, he was not entitled to the crops, and therefore that defendant was liable on his contract.

The declaration stated that in consideration that plaintiff, Sarah Ann Richardson, on 1st April, 1857, then being sole and unmarried, demised to defendant parts of Nos. 22 and 23 in the 2nd con., and 23 in the third concession of Charlotteville, to hold from year to year, defendant promised to deliver to her every year during his occupation under the lease one third of all the grain and produce raised on the demised lands, to be delivered in the bushel a reasonable time after harvesting the same. That defendant during the continuance of the demise in 1859 and 1860, raised on the demised premises 1,000 bushels of wheat, yet although a reasonable time had elapsed after harvest, and defendant had thrashed out the wheat, he had not delivered the third part or any part thereof. Common counts including one for use and occupation.

Pleas 1.—That he did not hold the lands under the demise and on the terms alleged. 2nd. Never indebted. 3rd. That on 17th April, 1860, the said lands were, under a decretal order of the Court of Chancery, (stating between what parties,) sold to Joseph Dunkin, who having duly paid the deposit required, became entitled to the possession, and entered into the same, and that afterwards when the said wheat became ripe and fit to cut and carry away, the said Dunkin took away one third part of the wheat and converted it to his own use, as he lawfully might, by reason whereof defendant could not deliver to plaintiff the said one third part.

Plaintiff joined issue on all the pleas, and replied to the third that at the time of the sale under the decretal order, the said wheat was duly reserved for the plaintiff, and Dun-

kin purchased the lands with full notice that the wheat was so reserved, and not sold with the lands. Issue thereon.

The trial took place at Simcoe in October last, before *Hagarty, J.* It appeared that the defendant was tenant to the plaintiff as stated in the declaration, and in the fall of 1859 sowed twenty-four acres of wheat. This action was brought to recover the value of one third thereof which the defendant had not delivered. The defendant himself proved the tenancy, and that he sowed and harvested this crop producing 623 bushels 45 pounds. The property (the land) had belonged to James Hooker, the former husband of the plaintiff Sarah Ann Richardson, and she had lived thereon for a long time after her first husband's death, and the defendant had boarded with her.

On the defence, a duplicate of an order in Chancery was put in, made on the 14th December, 1858, in the matter of the estate of James Hooker, late of the village of Port Ryerse, in the county of Norfolk, deceased, between Thomas Rigney and James Brown, the younger, on behalf of themselves and all other creditors of the said estate, plaintiff and Daniel Matthews, and James Covernton, by original order, and Sarah Hooker, Thomas Hooker, and Ann Hooker, infants, made parties in the master's office, by Alex. McDonald, their guardian, by which it was ordered that the real estate of the said James Hooker, or a competent part of it, be sold with the approbation of the master. The defendant left the farm about the end of March, 1860, still however, keeping the 24 acres, by looking after it and maintaining the fences, Joseph Dunkin purchased as stated in the third plea. At the sale there was a verbal declaration by the solicitor for the estate of Hooker (Mr. Stanton) that the crops in the ground were reserved, and the auctioneer so declared to those present at the sale. Mr. Taylor, the solicitor for the creditors, was also there, but did not join in any such declaration, but as far as appeared he did not express any dissent publicly, and after Dunkin bought, he (the last named solicitor) said no reservation was made by the Court of Chancery. Mr. Stanton wished a writing drawn up for the purchaser to sign, agreeing to give up the crop, but Mr.

Taylor said he did not dare do this, and no such reservation was made in the minute of the bargain signed by Dunkin.

After the sale, on the 8th August, 1860, Duncan and defendant signed a memorandum, by which defendant agreed to deliver to Dunkin one third of the wheat, and Dunkin agreed to protect defendant, in so giving it up to him as proprietor of the farm, and Dunkin agreed in effect to indemnify defendant against any loss to arise from the claim of the female plaintiff, widow of James Hooker, to this wheat.

It was agreed a verdict should be entered for plaintiff for \$225 63c., with leave to defendant to move to enter a verdict for him, or a nonsuit. The court to draw inferences from the evidence as a jury might do; that either party might produce, or the court might call for any further or other proceedings in the Chancery suit to elucidate the matter.

In Michaelmas Term, *Matheson* obtained a rule *nisi* to enter a verdict for the defendant, or a nonsuit on the leave reserved.

In the following term, *D. B. Read*, Q. C., shewed cause, citing Story on Agency, 5 Ed. 108; Parsons on Contracts, vol. 2, p. 293, note; *Bartlett v. Purnell*, 4 A. & E. 793; *Eden v. Blake*, 13 M. & W. 614.

Freeman, Q. C., and *Matheson* supported the rule.

DRAPER, C. J.—Dunkin appears to me in no other light than an inchoate purchaser, whose purchase is as yet no further carried out than the signing the auctioneer's memorandum goes. And it does not appear that he was even entitled to possession, though if he were, I do not think it would make any difference.

If any thing further has been done to confirm the sale and vest the legal estate in Dunkin, it is not shewn by the papers produced before us in argument. There is certainly nothing which entitles the defendant to resist the fulfilment of his contract with the plaintiff, either as amounting to an eviction, or as justifying an attornment to Dunkin as a person having title paramount. I confess I am surprised at

this suit, as I should have thought the Court of Chancery if applied to would have disposed of the question in dispute.

But for all that is shewn to us, I think the rule should be discharged.

Per cur.—Rule discharged.

VANEVERY ET AL. V. ROSS ET AL.

Interpleader—Form of issue—Question whether at the time of seizure or delivery of the writ to the sheriff.

A sheriff under a writ of execution in a suit A.v.B. seizes certain goods, C. having claimed the goods, an interpleader order was applied for and obtained, which directed an issue to try whether the goods seized were at the time of the delivery of the writ to the sheriff the property of B. This order was subsequently amended by altering the issue to try whose property the goods were at the time of the seizure by the sheriff.

An application was made at the trial by the defendants to have it postponed on the ground that the amendment was prejudicial to them, which was granted on payment of costs, the conditions not being complied with the cause proceeded and a verdict was taken for the plaintiffs.

On motion for a new trial,

Held, that the proper issue in an interpleader case is to try whether the goods at the time of the seizure, not at the time of the delivery of the writ to the sheriff, were the goods of the claimant.

This was an interpleader issue to try the title of the plaintiffs the claimants to certain goods, &c., taken in execution by the sheriff of the counties of Huron and Bruce on the 6th of August, 1860. The goods seized were the steamer Kaloolah, with her furniture, &c. The cause was taken down to trial at the last autumn assizes at Goderich. An application was then made to put off the trial. The principal ground taken was that the Hon. Mr. Justice *McLean*, by whom the interpleader was directed first ordered that the issue to be tried should be, whether the goods seized under the *fi. fa.* (in the suit of these defendants against Alexr. McGregor et al.) were at the time of the delivery of the writ to the sheriff the property of the plaintiffs; that this order was made on the 15th September last, and that afterwards, on the 1st of October, Mr. Justice *McLean* amended his said order so that the issue to be tried was, whether the goods claimed were at the time of their seizure by the sheriff on the 10th of August the property of the claimants as against the execution plaintiffs. That the amendment so

made was prejudicial to the defendants, and that they could not safely go down to trial on that issue. They therefore applied to put off the trial to enable them either to apply to the learned judge who made the order to vary it or to the court to rescind the amendment. His lordship the Chief Justice ordered the trial to be put off on the defendants' paying the costs. The payment of costs being a condition precedent to the putting off the trial, and the defendants having failed to pay the costs, the cause went on; the defendants did not appear at the trial, and the plaintiffs had a verdict.

In Michaelmas Term *Eccles*, Q. C., obtained a rule to shew cause why the verdict should not be set aside, and why the amendment made by *McLean*, J., to the original interpleader order should not be rescinded, and the interpleader order restored to its original form. There were various grounds suggested as to want of proper notice to the attorneys of the parties really interested (*viz.*, the assignees of the judgment creditors and of the sheriff) of the application to amend the order. He contended that the affidavits filed in reply clearly met the objections raised as to want of notice, and shewed that all parties were made aware of the amendment in the order shortly after the 1st of October, the day the amendment was made, and the Goderich assizes did not commence until Tuesday, the 6th of November, and that no application was made in the meantime to vary the order, or put off the trial, and no notice given of any intention to do so, so nothing would turn on that point, as the laches of the defendants would be the answer if the affidavits did not sufficiently shew an answer in other respects.

During Hilary Term *Richards*, Q. C., shewed cause, and contended that the amended order was in the proper form. That the *fi. fa.* in the original cause was delivered to the sheriff in September, 1859, and plaintiff's title to the vessel was not acquired until the spring of 1860. That if the original order stood plaintiffs must fail on the issue though their title to the vessel was valid, because it was acquired

since the writ came into the sheriff's hands. That the order as amended was in the proper form, and the issue was simply that the property was the claimants as against the execution creditors. If the lien on the vessel by the execution was such that plaintiffs as against it could not acquire any valid title, the issue would be found for defendants. If the plaintiffs could acquire a valid title as against the execution then the issue ought to be found for plaintiffs. He referred to the following cases to shew that the issue was in the proper form, and that defendants could properly set up their defence under it,—*Belcher v. Patten*, 6 C. B. 608; *Lot v. Melville*, 3 M. & G. 40; *Chase v. Goble*, 2 M. & G. 930; *Gadsden v. Barrow*, 9 Ex. 514; *McMaster v. Milne*, 2 U. C. Practice Reports, 386.

Ec cles, Q. C., contra, contended that as the property was bound by the placing the writ in the sheriff's hands, it would be unjust to defendants to limit their claim to the time of the seizure, for the plaintiffs may have acquired their title through the laches of the sheriff, and the defendants ought not to lose their remedy against this property on that account: or if the plaintiffs were allowed to shew property in the goods acquired after the writ was placed in the sheriff's hands, it ought to be in an action against the sheriff, and the interpleader order should be quashed entirely. He contended that the usual form of the issue, and that given in the practice was that the goods were the property of the claimant at the time the writ was placed in the sheriff's hands. He further urged that they had come in proper time to move to amend the judge's order, which could be done by the full court, and therefore they were not guilty of any laches and ought to have the order amended and a new trial without costs. He referred to *Webster v. DeLafield*, 18 L. J. N. S. C. P. 186; S. C. 7 C. B. Reports 187; *Teggin v. Langford*, 10 M. & W. 556. He also referred to *Castrique v. Imrie*, reported in 2 Law Times N. S. 180, to shew that plaintiffs' title to the vessel could not prevail as against defendants' claim under their execution.

HAGARTY, J.—The point appears to me to be free from diffi-

culty. No doubt the form in Chitty supports the defendants' argument that the question to be tried is as to the property in the goods at the delivery of the writ to the sheriff, and in the vast majority of cases this would be a safe form to adopt.

But a short reference to the object and meaning of an interpleader will, I think, dispose of all difficulty.

A sheriff seizes goods on an execution whether received an hour or six months previously—a person claims them as his, and the officer under the statute desires the claimant and the execution creditor who set him in motion to try the right to the property between them. The sheriff, till he has seized, should not be heard under the statute. Until seizure no interference takes place with the actual owner's right.

The real question is, and necessarily must be, not how the parties stood some months previously when the execution was received, but how they stood as to this property when the officer asking the aid of the statute first interfered with any person's right or ownership.

Has the sheriff lawfully or unlawfully as against the claimant seized the goods? If he can shew that they were bound by the legal operation of the execution from its delivery, he may doubtless do so to defeat the claimants' title, and shew that he therefore had a right to seize when he did. This may in my judgment be all readily tried on an issue framed in terms to raise the question, as to the claimants' right to the property when seized, against the execution creditor.

But if the claimants can shew a valid title to the goods so seized, which title had its origin before the seizure, but after the delivery of the writ to the sheriff, it would be fatal to his interests to leave the issue as it was originally in this case.

A *bona fide* sale might be made in an American port by a competent admiralty or other tribunal, proceeding *in rem* for some infraction of revenue or other law, of a vessel plying regularly to a Canadian port. A stranger to all the previous history of the ship might buy her in good faith for her full value, and place her on the same or some other route to one of our ports. It would be a curious state of the law if she should be liable to seizure in the Canadian harbour

and the purchase abroad rendered of no avail, because three months before while in Canadian waters the sheriff had an execution against her then owners, which for some reason he had never laid on by seizure.

This may or may not be the present case, but it forcibly illustrates the claimants' argument that the substantial fact to be tried must always be whether the sheriff rightfully interfered with the property, in other words, can the claimants shew that when he so seized, it was their property that was taken as against the execution creditors?

The Mercantile Amendment Act 19 & 20 Vic., ch. 97, (imperial,) makes a salutary change in the law prevailing since the Statute of Frauds. A *bona fide* purchaser for value without notice of a *fi. fa.* in the sheriff's hands at the time he acquires his title is now protected in England against such writ. The form in Chitty resting the issue on the title at the time of delivering the writ to the sheriff would of course be inapplicable in the case of any claimant seeking the protection of that excellent statute. In three of the cases cited, *Lott v. Mellville*, (3 M. & G. 40,) *Chase v. Goble*, (2 M. & G. 930,) and *Gadsden v. Barrow*, (9 Exo. 514,) the issue was as to the right of claimant at the time of seizure. I am satisfied that such is the correct form, and the only one applicable to a case like this.

But under all the circumstances, I think there should be a new trial on payment of all plaintiffs' costs within four weeks from this day, otherwise rule discharged.

Rule accordingly.

**THE CITY OF GLASGOW BANK V. JOHN MUIR MURDOCK AND
EDWARD CURRIE.**

Bill of Exchange—Accommodation acceptance by one of a firm—Partnership bound—Release of Drawer—Not a discharge of acceptor.

On an action by plaintiffs, endorsees for value, against a firm of M. and C., on a bill of exchange drawn by W. S. & Co., in their own favor, accepted by the defendants and endorsed by W. S. & Co., to plaintiffs, the defendant C. pleaded that the bill was accepted by his partner M. as an accommodation for W. S. & Co., and was therefore not within the scope and objects of the partnership business. Also *equitably* that plaintiffs *after* the bill had matured, having notice of the accommodation acceptance, agreed with W. S. & Co. the drawers, without the consent of defendant to accept a composition from W. S. & Co., which composition was paid plaintiffs, who thereupon discharged W. S. & Co. from liability, and that defendants were discharged *in equity* thereby.

On demurrer *held*, 1st. That the assent of a firm is to be presumed by the use of the name of the firm by one of the partners—that the *onus probandi* rests on those seeking to rebut the presumption.

2nd. That the holder of a bill for value notwithstanding his having subsequently become aware of its being an accommodation bill, may release the drawer without releasing the acceptor.

The plaintiffs declared as endorsees of a bill of exchange, dated 23rd April, 1859, drawn at Glasgow in Scotland, upon and accepted by defendants, using the name, style and firm of Murdock & Currie, trading in Upper Canada; the drawers of the bill were stated to be William Smith & Co., and it was drawn payable to the order of the drawers, for £200 sterling, at four months after date.

Pleas by defendant Currie, 1st. *Non-acceptaverunt.*

2nd, by Currie, that the bill was accepted by the defendant Murdock for the accommodation of the drawers, and without any consideration, and that defendant Murdock in accepting the bill in the partnership name was not authorized by this defendant; that such acceptance was beyond the scope and object of the partnership business, and foreign to the purposes thereof, and was not expressly or impliedly assented to by this defendant, and that the plaintiffs took the bill with notice.

3rd, That the bill was drawn by William Smith & Co., and accepted by defendant Murdock in the partnership name, at Glasgow, in Scotland, and that thence and up to the 28th of August, 1859, defendants were merchants carrying on business, Murdock at Glasgow, and Currie at Toronto; that the partnership having become indebted, Murdock, after the

bill became due, and while the partnership continued, petitioned the proper court in Scotland for the sequestration of his real and personal estate, and of that of the partnership, pursuant to the provisions of the imperial stat. 54, Geo. 3, ch. 137, that on such petition the sequestration was granted, and before the commencement of this suit the said court found defendant Murdock entitled to be finally discharged of all his debts, both individual and as a partner, contracted before the application for such sequestration, and did discharge him from such debts.

Averment that the causes of action in the declaration accrued to plaintiffs before the application for the sequestration; that at the time of the endorsement to plaintiffs they were resident and carried on business at Glasgow as aforesaid, and the bill was a debt provable by them under the sequestration, whereby the defendants were discharged.

4th, On equitable grounds, that the bill was accepted by Murdock in the partnership name for the accommodation of William Smith & Co., and without consideration; that plaintiffs, after it matured, and with notice that it was thus accepted, agreed with William Smith & Co., without defendants' consent, to accept a composition from W. S. & Co., in discharge of their liability on the bill, which composition was paid to plaintiffs, who thereupon discharged W. S. & Co., from all claims on the bill, and that defendants were discharged in equity thereby.

Demurrer to second plea, because it did not shew such a fraud as to invalidate the bill in the hands of an owner for value, and did not shew but that plaintiffs received it from some party who was a holder for value without notice.

Demurrer to third plea. No allegation that by the law of Scotland the sequestration of the goods of one partner discharges the firm. No such dissolution of the contract in Scotland alleged as would prevent plaintiffs suing for a breach in this country.

Demurrer to the fourth plea, that no such relation of principal and agent arises from the notice stated as will support the plea. No allegation that plaintiffs had notice that this bill was accepted as an accommodation when they took it.

Anderson supported demurrer. As to the second plea he relied on *Lewis v. Reilly*, 1 Q. B. 349. As to the third; this plea only shewed a personal discharge of Murdock, not a discharge of the debt even in Scotland. The court know nothing of the effect of a sequestration beyond what the plea shews. A release *inter parties* and one by operation of law rests on distinct principles. He distinguishes *Sidaway v. Hay*, 3 B. & C. 12, on the ground that the 54 Geo. III., ch. 137, did not extend here, for though the terms were general they were evidently limited to the United Kingdom. As to the fourth plea, he argued against any extension of the doctrine of *Pooley v. Harradine*, 7 E. & B. 431. He referred to *Greenough v. McClelland*, 6 Jur. N. S. 773.

Adam Crooks, contra, cited *Lindley on Partnership* 330, as throwing doubt on the case of *Lewis v. Reilly*; but independently of that he argued that the plea showed fraud on the part of Murdock, and that there was no necessity to charge fraud in express words. He cited *Ernest v. Nicholls*, 6 H. of L. 419 (3 Jur. N. S., 919, s. c.); *Hood v. Aston*, 1 Russ. 412; *Balfour et al. v. Ernest*, Official Manager of the Sea Fire, Life Assurance Society, 5 C. B. N. S. 601; *Athæneum Life Insurance Society v. Pooley*, 5 Jur. N. S. 129; *Anglo-Australian and Universal Family Life Insurance Company v. The British Provident Life and Fire Insurance Society*, 5 Jur. N. S. 1280, *Ex parte Graham*, 5 DeGex. Macn. & G. 356.

In support of the third plea he referred to *Archbold's Bankruptcy* 415; *Lindley on Partnership* 1127.

He argued that with the exception of *Ex parte Graham*, the authorities were favorable to the fourth plea, referring to *Davies v. Stainbank*, 6 DeGex. Macn. & G. 679.

DRAPER, C J.—So far as the case of *Lewis v. Reilly* is applicable, I should be prepared to follow it. It can scarcely be held, however, to govern this case.

The assent of a firm is to be presumed from the use of the name of a firm by one of the partners, the *onus probandi* rests on those who seek to rebut the presumption, and the question on the demurrer to the first plea is, whether the

facts if proved as alleged would shew a want of authority on the part of Murdock to accept this bill so as to bind the copartnership. In *Sutton v. Gregory*, 2 Peake 150. P., a partner in the firm of L. & P. in London, and also in the firm of G. & P. in Boston, drew a bill in London, but dated in Boston, in the name of G. & P., and accepted it immediately in London, for the accommodation of the London House. In an action by the endorsees G. was held liable, the endorsee having taken the bill without notice; but there P. was using the name of G. & P. for his individual benefit, and was clearly therefore committing a fraud upon the American partner, and the defendant must show as clearly [that this was a fraud upon him. Now what he relies on is, that the acceptance was without consideration and for the accommodation of a third party—that it was given without his authority, to which I attach the meaning—that he knew nothing of it, and a general allegation that the acceptance was beyond the scope and object of the partnership, and entirely foreign to the purposes thereof; but he does not state that the acceptance had no reference to any transaction and dealings between W. S. & Co. and the firm, unless that is to be properly inferred from what is stated. (See *Sandilands v. Marsh*, 2 B. & A. 673; *South Carolina Bank v. Case*, 8 B. & C. 427.) I think this plea does not go far enough to be an answer to the declaration.

The third plea sets up a discharge under the British statute 54 Geo. III., ch. 137. *Mr. Crooks* did not appear to place much reliance on it, and with the more reason, as that statute was repealed by the 19 and 20 Vic., ch. 79, which was in force during the time of all the transactions mentioned in the declaration and in the plea.

As to the fourth plea, the agreement to accept a composition from Smith & Co., is alleged to have been made *after* the bill matured, and with notice that the defendants' acceptance was for the accommodation of Smith & Co. This notice refers, I think, to the time of making the agreement, and this was *after* the bill was over due. This comes precisely within the case of *ex parte Graham*, in which it was held that the holder for value of an accommodation bill, without notice that

it is a bill of that description, may, notwithstanding his becoming subsequently aware that it was an accommodation bill, release the drawer without releasing the acceptor, and then this plea is bad.

HAGARTY, J.—A question was raised on the argument as to our taking judicial notice of the imperial act mentioned in the third plea. I assume now that both parties took it for granted that the court had no knowledge of any imperial statute on this subject. I find a plea averring a discharge, by one of the defendants under a sequestration grounded on the statute 54 Geo. III. ch. 137 and that the debt arising on a bill of exchange drawn in 1859 was barred thereby. It is important to the court, though apparently not to the parties, to know that the act relied on was repealed expressly by the 19 & 20 Vic., ch. 79, which came into force on the 1st of November, 1856, several years before this debt existed; so much for the veracity of the plea.

Neither of these acts seem to provide in terms for any reserve of remedies against co-partners not joined in the bankruptcy, but it appears very clearly to me that nothing but a purely personal discharge is given by either act.

The point was substantially raised in *Heath v. Hall*, 4 Taunt. 327, on the construction of sec. 14 of the English Bank Act, 49 Geo. III., ch. 121, which certainly is as strong in defendants' favor as the act relied on in his plea. *Mansfield*, C. J., says, "Is it meant to be insisted that an act has been passed within the last six or seven years so monstrously unjust and absurd that where a joint debt is due from two partners and a commission issues against one of them, the creditor cannot prove his debt under the commission, and also sue the other partner?"

I also refer to *Sleech's case*, 1 Mer. 570. The existing English Bankrupt Laws contain express reservation of remedies against partners and others not included in the fiat.

Judgment for plaintiffs.

WILLIAM LUNDY V. JOHN MALONEY.

Ejectment—Consol. Stat. U. C., ch. 90, sec. 12—Vested remainder.

Plaintiff claimed title by sheriff's deed of the lands in question, sold under an execution against one John Maloney, who was devisee of the said lands, subject to certain legacies under the will of John Maloney, deceased. For the defendant, it was urged that no proof having been given of John Maloney's performance of the conditions of the will that the estate never vested in him. Also that the estate having been created before A. D., 1850, it could not be sold under execution. *Held*, that the conditions of the said will were conditions subsequent, and it was for the defendant to show that the estate had been divested by non-fulfilment thereof.

2nd. That the estate was a *vested remainder*, and not such an estate as required the aid of ch. 90, Con. Stat., sec. 12, to allow of its being sold under an execution against the defendant.

EJECTMENT for the south-half of number 10, 1st concession, Douro. Defence for the whole. Writ tested 2nd of February, 1860.

Plaintiff claimed under a deed from the sheriff of the county of Peterboro', made in pursuance of a sale on a *fi. fa.* against lands, in a suit of McQuestin *et al.* v. Kean & Maloney. The defendant claimed under a deed of bargain and sale from one Thomas Maloney, to himself, Thomas Maloney being heir-at-law of John Maloney, deceased, who was entitled thereto through the grantee of the Crown.

The trial took place at Peterboro' in October, 1860, before Burns, J. The judgment, &c., in the cause of Calvin McQuestin and Alexander Fisher, against James Kean and John Maloney, the defendant, and the sale by the sheriff of the land in question were proved, and a deed dated the 21st of January, 1852, from the sheriff to the plaintiff for a consideration of £10, was also put in and proved. The question was whether the land belonged to the execution debtors, or to either of them. To prove this the plaintiff put in and proved, by one of the subscribing witnesses, the last will of John Maloney of the township of Douro, dated the 3rd of March, 1834, by which after willing that all his just debts be paid, he gave and bequeathed to his wife, Margaret, the whole of his real property during her natural life, or so long as she remained his widow. After her death, or in case she married, "the whole of the same real property I will and bequeath unto my youngest son, John, on condition that he

pays the following sums, that is to say: £50 to my son, (name effaced,) Maloney, one pound to my son, Denis Maloney, and one pound to my son, Thomas Maloney, and one pound to my daughter, Mary Maloney Grisdale, one pound to my daughter, Catherine Maloney Williams; all of the above sums to be paid three years after my death." It was admitted that the testator died in 1836, and his widow, in May, 1859. A demand of possession was made by plaintiff of defendant in July, 1859. Defendant was then in possession, and he was also in possession when his father died, and for some years after, and though absent for a time in the United States, he had lived on the premises of late years. This was the plaintiff's case.

On the defence, some objections were taken to the proof of the will, but the jury found that the testator signed the will in the presence of the three witnesses, and they in the presence of each other. It was also objected, that there was no proof that the devisee had performed the conditions contained in the will, and therefore the estate was not shewn to have vested in him; that the defendant got no such estate under the will as could be sold under a *fi. fa.* against lands; that the widow had a prior estate; that the estate to defendant was created before the 1st January, 1850, and could not be sold in execution.

The learned judge ruled in favor of the plaintiff, reserving leave to the defendant to move to enter a nonsuit, and the plaintiff had a verdict.

In Michaelmas Term, *Hector Cameron* obtained a rule nisi to enter a nonsuit accordingly.

In Hilary Term, *D. B. Read*, Q. C., shewed cause. He referred to the Consolidated Statutes U. C., ch. 90, sec. 5 & 11, and cited *Doe v. Cumming*, 4. U. C. Q. B. 390, to prove that the defendant took a vested remainder in the land under his father's will, and having been in possession both during the life of his mother, who had a life estate, and since her death, he could not call upon the plaintiff to prove that he (defendant) had made default in paying the sums required by the will to be paid.

Hector Cameron argued that the estate given by the will was either conditional or a contingent remainder. There were specific legacies subject to which the devisee took the estate, and they were made payable within a limited period. He referred to *Crabb* on real property, sec. 2145-2153, and he further argued that if this was either a contingent remainder, or an estate on condition, it was not saleable under execution. This he contended was the effect of the 12th section of the statute referred to.

DRAPER, C. J.—I think the terms of this will are such that we cannot hold the payment of the legacies to be more than a condition subsequent, *i. e.*, a condition that may operate to defeat the estate granted to and vested in the defendant, as devisee. If indeed it were a condition precedent the plaintiff must have shewn performance, as without that he could have acquired no title, but as a condition subsequent, it is for the defendant to shew that the estate has been divested by non-fulfilment thereof, and if there could be one case stronger than another calling for the application of such a rule, it must be one where the devisee is the defendant in possession of the estate, which so far as any evidence given at the trial shews he had no right to unless under the will.

As to the objection that this estate is not saleable by execution, because the 12th section of the statute referred to (Consol. Statutes U. C. ch. 90) limits the application of the act, and declares that it shall not extend to any deed, act, or thing executed or done, or to any estate, right or interest created before the 1st of January, 1850, the answer is, that this is not such an estate as required the aid of that statute in order that it might be sold under an execution against the defendant. It is a vested remainder as I construe the will—not “a contingent, an executory, or a future interest,” or a mere “possibility coupled with an interest,” nor yet “a right of entry immediate or future, vested or contingent.”

As a vested remainder the devisee had an immediate fixed right to take effect in possession after the death of the tenant for life, he had the power to lien or to encumber it, and it

became therefore liable to be charged by a judgment, or to be sold under execution by virtue of the 5 Geo. II.

I think, therefore, this rule should be discharged.

Per cur.—Rule discharged.

DICKSON, DEFENDANT, (APPELLANT,) v. PINCH, PLAINTIFF,
(RESPONDENT.)

Appeal—Witness—Competency of a party to suit when called by opposite party.

Held, that a party to a suit called and examined as a witness at the instance of the opposite party is rendered competent as a general witness, and that his incapacity by reason of interest is thereby wholly removed.

See *Lamb v. Ward*, 18 Q. B. U. C. 305, where the contrary is decided.*

APPEAL from the county court of the united counties of Peterborough and Victoria.

Writ issued August 9th, 1860.

Declaration.—Common counts, for money payable, work done, money received, interest, and account stated.

Pleas 1st. Never indebted. 2nd. Satisfaction and discharge by payment. 3rd. Set off.

The following were the particulars of the plaintiff's claim as endorsed on the writ.

\$86 01c. balance due on a due-bill, dated the 16th day of November, 1857, made by the defendant, and now over due, with interest; also \$18 25c. being for the wages of the defendant for work and labour done for the plaintiff between the 1st of January and 1st of March, 1860, and also for 38 days' work of the defendant for the plaintiff as engineer, from the 22nd of March, to the 4th of May, 1860, \$43 89c.

The plaintiff claims interest on \$86 01c. from the — day of November, 1859, on \$18 25c., from the 1st day of March, 1860, and on \$43 89c., from the 8th day of May, 1860, until judgment.

Particulars of defendant's set-off.

Rent due, May, 1860.....	£5	0	0
1858. Paid William Wood.....	3	10	0
1859. " B. Reynolds.....	7	10	0

£16 0 0

*NOTE.—There being no further appeal from the decision of this court on a matter appealed from a court below, the usual rule of *abiding by* the decision of a tribunal of co-ordinate jurisdiction till appealed from was departed from, and the opinion of the court expressed.

At the trial, Samuel Dickson, the defendant, was called and examined by *Mr. Weller*, on behalf of the plaintiff, and stated that the due-bill produced made by Wood, on his behalf, is correct, also the shanty time.

On *cross-examination* by *Mr. Dennistown*, the following question was asked and objected to by *Mr. Weller* as inadmissible:

"Whether the defendant made any other payment than the payment endorsed on the due-bill?" This question was allowed by the learned judge with leave for the plaintiff to move against the verdict, and if the question should be found improper, and no other evidence offered by the defendant of the payments spoken to by him, the verdict should be amended by adding the amount spoken to and proved by the defendant alone, to the plaintiff's verdict.

To the best of my recollection I paid the plaintiff \$30 on the due bill; I paid Reynolds for him; it was not included in the settlement; I paid him \$3, \$8, or \$10, and \$5 at different times on shanty time.

The learned judge directed the jury to find for the plaintiff without reference to amount, but to inform the court how much was to be deducted on Mr. Dickson's statement.

The jury found a verdict for the plaintiff for \$66, leaving \$48 struck off on account of the allowance of Dickson's testimony.

On the first day of term at the sitting in term of the county court of the united counties of Peterborough and Victoria, *Mr. Weller*, pursuant to leave reserved, moved for a rule *nisi*, to which cause was shown by *Mr. Dennistown*, and the court gave the following judgment: "The question in this matter is whether the defendant—who was put in the witness box by the plaintiff in order to prove the making of a due-bill part of the plaintiff's cause of action, and not for the purpose of proving any other fact—could afterwards be made use of in his own behalf by being cross-examined as to whether he (the defendant) had not reduced the amount apparently due on the face of the due-bill by other payments of a subsequent date to those which appeared allowed on the face of the due-bill itself admitted.

"The question allowed, subject to the leave reserved to the

plaintiff at the trial, has been fully argued, and I think, on the authority of *Lamb v. Ward et al.*, 18 Q. B. U. C. 304, the only case in which, as far as I am aware, the point has been the subject of adjudication, must be found in favour of the plaintiff.

"The ruling of the majority of the court of Queen's Bench, and some of the cases suggested by his lordship the *Chief Justice*, if I construe them correctly, leave no other course open.

"I cannot draw the line between a defendant proving one payment, and proving a general set-off, or his proving his endorsement, and his freedom from liability by reason of time given by the holder to the maker of a promissory note of which he was endorser, and the making of a due-bill, as in this present instance, and the making payments which do not appear to have been otherwise credited upon it.

"The payments on the time bill would necessarily fall under the same rule.

"I may, and do individually prefer the judgment and reasoning of the dissentment to the judgment of the majority in *Ward's* case, but as long as it stands unshaken, it in my opinion, is binding upon this court, and the plaintiff's rule must be made absolute."

This judgment was appealed from on the following grounds:

That the questions asked the defendant on cross-examination were properly admissible, and that the judgment of the judge of the county court of the united counties of Peterborough and Victoria, on making the rule absolute to increase the verdict, is erroneous and should be reversed.

The case was argued by *D. B. Read*, Q. C., for appellant, citing 16 Vic., ch. 19, sec. 1, and referring to *Lamb v. Ward*. *Eccles*, Q. C., contra.

DRAPER, C. J.—We cannot reverse the judgment of the learned judge of the county court, without coming into conflict with the opinion expressed by the Court of Queen's Bench in *Lamb v. Ward et al.*, 18 Q. B. U. C. 304.

It is the more usual, as well as the more convenient prac-

tice, where a question of law has been decided by a court of co-ordinate jurisdiction, to treat that decision as a binding authority until it shall be reversed by a higher tribunal. This practice, however, is subject to exceptions. In *Henderson v. McLean*, 16 U. C. Q. B. 630, the Court of Queen's Bench expressed their regret that they could not concur in some of the opinions expressed by this court in *Henderson v. McLean*, 8 U. C. C. P. 42; so in *Reynolds v. Harris*, 3 C. B. N. S. at p. 289, *Cockburn*, C. J., observes "if our decision could be taken to a Court of Error, we should feel bound by that case" (one which he had referred to) "as a precedent," but he adds, "doubting whether the record could be framed so as to raise the point, and seeing that it is one of a class which rarely finds its way into a Court of Error, we think we ought to deal with the case as one in which there is no appeal, and act upon our own judgment." In one respect these words apply exactly to the present case. There is no appeal from our decision. We are sitting as a Court of Appeal to which the appellant, having a right to go to either of the superior courts of common law, has elected to apply for a review of the judgment of the court below.

I am fully alive to the inconveniences that may arise from opposing judgments being rendered in the two courts on this question, the greater, because the point is one that may frequently arise *at nisi prius*. We can only hope that either a decision of the Court of Appeal, or a declaration of the legislature, will speedily remove them. But I do not perceive on what ground we can withhold from this party the expression of the conclusions at which we have arrived.

A very few years back witnesses were held to be incompetent to testify for any of the following causes: want of understanding—want of religious belief—for infamy of character, or for interest.

It was moreover considered a privilege of parties to a suit that they might refuse to give evidence, and a disqualification of, that they were not permitted to swear in their own favour.

The first change in these respects made in Upper Canada was by the passing the statute, 12 Vic., ch. 70, which following the British statute, 6 & 7 Vic., ch. 85, enacted that

no person offered as a witness should be excluded by reason of incapacity from crime or interest from giving evidence, but on this rule a proviso was engrafted containing some exceptions, namely, any party to an action, suit or proceeding individually named in the record, any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, the landlord or other person in whose right a defendant in replevin made cognizance, any person in whose immediate or individual behalf any action was brought or defended wholly or in part, or the husband or wife of such parties respectively.

The 14 & 15 Vic., ch. 66, repealed this proviso, making the only exception, that no married woman should be allowed as a competent witness in any civil proceeding for or against her husband. Both these acts were repealed by 16th Vic., ch. 19; after the latter of them had been in force a little more than 14 months. During that time it certainly was found that perjury was committed to an alarming extent by parties to suits, who offered themselves as witnesses in their own behalf, under its provisions. It was very probably the shock felt by judges and jurors on hearing the opposite parties in a cause, make the most contradictory and irreconcilable statements on oath as witnesses, rather than any increased difficulty experienced in coming to a decision, that made a change in the law very generally desired. Whether after a longer trial of that law, the evil experienced would have materially diminished, and the result have been, as in England, a conviction of the advantage of removing every disqualification to give evidence in civil cases arising from crime or interest, I do not profess to say; we have to deal with the law as contained in that statute, which has been re-enacted in the Consolidated Statutes of Upper Canada, ch. 32, and to which I now refer.

By section three the provisions of the first statute, 12 Vic., are re-enacted that no person offered as a witness shall be excluded from giving evidence by reason of incapacity arising from crime or interest; but (by sec. 4) every person so offered shall be admitted and be compellable to give evidence on oath, &c., thus taking away the privilege of refusing as well as the disqualification to give evidence, arising from in-

terest in the matter under trial, or that he had been previously convicted of a crime or offence. Section five declares that the act shall not render competent or authorize or compel any party to the suit individually named in the record, or any claimant or tenant of premises named in ejectment, or the landlord or other person in whose right any defendant in replevin makes cognizance, or any person in whose immediate or individual behalf any action may be brought or defended, or the husband or wife of any such party to be called as a witness in behalf of such party, "*but such party may in any civil proceeding be called and examined as a witness in any suit or action at the instance of the opposite party;*" but this does not extend to the wife of the party to any suit or proceeding named in the record.

It is upon the construction of the few words above quoted that the decision has been given which is now appealed from. The learned judge has held, contrary as he says, to his own impression, and in deference to the case of *Lamb v. Ward*, that the defendant who was called as a witness by the plaintiff, in order to prove his own signature, was not a witness for all purposes, and could not be cross-examined by his own counsel to prove that he had subsequently paid a sum of money in part satisfaction and discharge of the promise to pay contained in the instrument he proved.

In construing an act of parliament it is impossible to deny that our judgments are effected and guided according to the stand point from which we contemplate its provisions. It is one thing to regard this act as based upon the principle that the attainment of truth should not, subject to certain exceptions, be impeded by incapacities created by law, but that the fullest information as to the facts in issue should be laid before those who are to decide upon them, who should exercise their judgment on the credit of the witnesses, and the truth of their testimony. It is another to view it as an innovation upon an old established rule, which rule is still to prevail where not absolutely changed, and is to be the guide for deciding all doubtful points arising on the construction of the new enactment.

I think the former is the true point of view from which to examine this question, and to ascertain the true meaning of

the language used by the legislature. The reason of this law I take to be general, to remove obstructions to the enquiry after truth, arising from incapacities created by law. I take the exception, the exclusion of certain persons from being witnesses to be special, and to be considered necessary from apprehension of mischief that might result from allowing parties to institute or defend actions in reliance on their own oaths to sustain their side of the question. And I apprehend that where the general reason of the law is limited by any special exception, such exception shall not prevail over the general reason any further than a strict interpretation of the language used in creating it will warrant, and *a fortiori* that the language of the exception shall not be enlarged by construction to override the general reason.

As I read this act I find three things :

1st. An express removal of all incapacity to give evidence arising from crime or from interest.

2nd. An exception to the removal of incapacity.

3rd. An exception to that exception.

I need say nothing on the first point, for nothing can be more explicit than the language of the first section, which is confirmed and amplified by the second.

The exception is contained in section three, and is expressed with equal clearness. It follows almost verbatim a similar provision in Lord Denman's act, 6 and 7 Vic. ch. 85.

The third section also contains the provision which gives rise to the controversy, and which I treat as excepting something from the operation of the former exception. The former selects certain classes of person, out of those who by the first section of the act are made competent witnesses, and declares those classes to be incompetent. The latter under defined circumstances again removes the incompetency. In other words, under sections one and two, all persons, including parties to suits, are enabled to give evidence. The first part of section three, excepts parties to suits, among others from the operations of sections one and two, and then immediately provides that any party to a suit may be called and examined as a witness at the instance of the opposite party. If so

called he becomes at once a "a person offered as a witness" under the first section, no longer excluded by incapacity from interest, and under the second section he is to be admitted, and is "compellable to give evidence on oath or solemn affirmation." I am unable to put any other construction on the words, "at the instance of the opposite party," than this, that they remove the prevention just created to examining as a witness, a party to the suit, provided the opposite party wills it. The exception that a man shall not be offered as a witness to prove his own case is upheld, but his opponent is empowered to call him. I think the words used amount to this: every plaintiff may call the defendant, and every defendant may call the plaintiff, as a witness in the cause. If the legislature meant to limit such calling to the giving proof in support of the case of the party by whom he is called, but not to give evidence to the same extent that every other witness is required to do, I think they would have been careful to express that intention in words more suitable than "that he may be called and examined *as a witness*." They have not even said that he may be called and examined *for or in behalf* of the opposite party, from which it might be reasonably inferred that the examination was to be limited to those subjects respecting which the party calling him had examined him. He is called as a witness, and so far as the language used goes, there is no distinction made between him and any other witness called and examined in the cause.

I do not think therefore that the mere words of the statute warrant any other limitation on his testimony than that which would apply to all witnesses. But leaving the question of strict construction, I have not been able to satisfy myself that there exists *aliunde* such an objection to the full examination of a party to the cause who is made a witness at the instance of the opposite party, that the proposed limitation ought if possible to be adopted, in other words that we ought to assume that this was the intention of the legislature in passing the act.

The objection is twofold as urged for the respondent. 1st. That a party is not to be believed when he swears anything

on his own behalf, or 2nd., that if a party who desires to examine his opponent as a witness for some particular object, by calling him makes that opponent a general witness in the cause, no one will run that risk, and so the statute will be made a dead letter.

As to the first alternative, it cannot be denied but that there are men unprincipled enough to bring unjust actions and to set up unjust defences; men of whom it might well be feared, that to maintain such suits or defences they would (if legal penalties could be evaded) swear falsely themselves or procure others to do so. Such men are not very likely to tell the truth against themselves on an occasion when, if the truth appeared, their action or their defence must fail. This argument extends to the utter exclusion of parties to a suit from being witnesses.

The second alternative seems to me to present a very one-sided view of the question. By calling his opponent as a witness, the party affirms his credibility. Can he limit that affirmation to such matters as may be against the interest of his opponent, and deny his credibility as to all other matters in issue between them? Or can he admit his credibility generally, and admitting his knowledge of the whole truth of the matters at issue between them, insist that he shall only tell part of the truth; namely, that which the party calling him desires, but shall tell no more, because the statute does not make him competent to be called as a witness in his own behalf? I can understand an interested party contending for such a construction. I can feel the tendency of such an argument to establish that the exceptions in the third section are at variance with the principles advanced in the preamble to the 16 Vic.; but I cannot imagine that such a construction is consistent with these words, "*Whereas the enquiry after truth in courts of justice is often obstructed by incapacities created by law, and it is desirable that full information as to the facts in issue should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony.*"

It is admitted, that, provided the cross-examination of a

party called as a witness is confined to the subject matter of his interrogation in chief, it is to be subject to no other limitation. The practical value of the limitation claimed will depend in many instances on the astuteness of the witness, who may contrive so to shape his answers as to blend together the facts which he desires to advance in his own behalf with those which make against him, and to which the examination in chief is directed, just as an equity draftsman will so frame an answer, that it will be difficult for the plaintiff to read a passage in support of the bill, without also reading something which sustains the defence. But it seems to me a bad practice for the attainment of truth, to make the admission of the proof of important facts in any degree dependent upon the ingenuity with which answers to interrogatories can be framed, and it is not theoretically, at least, made better by compelling a party to answer just so much as it suits the interest of his opponent to ask, and preventing him from stating independent facts which will shew the whole truth, and yet nothing but the truth.

Upon the whole, I am of opinion that if a party to a suit is called and examined as a witness at the instance of the opposite party, he stands on the same footing as any other witness in the cause as to competency, that his incapacity by reason of interest is not partially, but wholly removed, and his credibility must be left to the jury.

As a consequence, I think this appeal should be allowed, and that the rule allowing the plaintiff to increase the verdict rendered for him at the trial pursuant to leave reserved should be discharged in the court below without costs.

RICHARDS, J.—In this matter this court is the tribunal of the last resort to the parties, and they are bound by our decision without any further right of appeal. We are therefore properly asked to decide this case according to the views held by this court notwithstanding the Court of Queen's Bench, a court of co-ordinate jurisdiction, may have decided the point raised differently from what we shall.

It was not denied in argument before us, nor am I aware that there is any intention of disputing the proposition,

that the rule laid down by Mr. Taylor in his work on evidence is the correct one, (vol. 2, p. 1116, sec. 1289,) as applied to an ordinary witness in the cause, viz., "that if a plaintiff call a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence."

In the United States a different rule prevails in many of the states, and there "a party has no right to cross-examine a witness except as to facts and circumstances connected with matters stated in his direct examination, and if he wishes to examine him by other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause." If the rule in the American courts prevailed here, we might with more propriety be called upon to decide in favor of the plaintiff, for as he only examined the defendant as to certain matters, the latter could not in his cross-examination give evidence as to other matters on which he was not examined in chief; and if the defendant desired to give evidence in his own favor, he would be called (after his own case had been gone into) as a witness for himself, and being a party to the cause this would seem to be contrary to our statute.

If, then, the rule which prevails in England and Ireland, and which I have always understood to be in force here is to be acted upon, if the defendant was a witness in the cause, he might, on cross-examination, be called upon to state all he knew about the matters in dispute between the parties, as well what was favorable to himself as what was unfavorable.

The whole question resolves itself into this, is a party to a cause when called by his opponent, a competent *witness* in that cause? or is he only then to answer certain questions and be cross-examined as to the matters arising out of such questions?

Without reference to the object of the statute 16 Vic., ch. 19 Con. Stat. U. C., ch. 32, or any arguments deducible from the wording of the various sections of that act applicable to the point in dispute to which I shall refer presently, let

us see why the defendant can properly be treated differently from any other witness. The oath he takes is the same as that administered to an ordinary witness, and by it he is bound to "depone the whole truth, so that he is not to conceal any part of what he knows whether interrogated particularly to that point or not."—3 Blackstone Com. 372.

Can he, with propriety, and in view of his oath, refrain from stating the whole truth on the issues joined between the parties merely because such statement may be favorable to himself? In the old form of answers to a bill in Chancery, or to interrogatories under the Common Law Procedure Act, the party swore to the truth of the answers, and his opponent read them as evidence against him or not, as he pleased. But when a witness is called in open court his answers to questions if pertinent to the issue are evidence in the cause whether the party calling him wishes to make them evidence or not.

As the law formerly stood if a defendant consented to give evidence in a cause when called by the opposite party, and the other defendants also consented, he was a good witness. He was not a competent witness if tendered for himself and co-defendants, and he was not compellable to give evidence against himself, but if he consented to be examined, he was then an admissible witness. The moment he was an admissible witness, I do not see how any evidence that he might give, pertinent, of course, to the issue, could be excluded from the consideration of the jury. That the evidence he gives is favorable to himself might be urged to the jury as a ground for not placing too much reliance upon it, but I cannot see that it would justify a court in rejecting it.

The change of the law in relation to the admissibility of witnesses and parties to suits in England to give testimony, who were formerly excluded on the ground of interest, was no doubt caused by the adoption in a great measure by the legislature, of the views of Mr. *Bentham*, propounded in his work on the *Rationale of Judicial Evidence*. The whole change proceeds on the broad ground that all persons,

parties to the suit or otherwise, who can give information as to the facts on which the court and jury wish to be informed may be sworn and examined; and that all those facts which were formerly considered sufficient to exclude the evidence on the ground of interest were to be taken into consideration by the court and jury in judging of the credibility of the witnesses. In that view the English statutes from time to time were passed, each subsequent enactment limiting the exceptions by which evidence was excluded, so that now in almost all suits the parties litigant may give evidence in their own favour, and bills have been from time to time brought before parliament to extend the same principle to a certain class of indictable offences, so as to permit the defendants to be sworn in their own defence.

The preamble to our statute of 16 Vic., ch. 19, clearly refers to the obstruction interposed in courts of justice to enquiries after truth by *incapacities* created by law, and states that it was desirable that full information as to the facts in issue should be laid before the persons appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony. The first section of the act provides that no person offered as a witness shall be excluded by incapacity from interest from giving evidence on the trial of any issue joined in any court, or before any judge, jury, &c., but that every person so offered may and shall be admitted and compellable to give evidence on oath notwithstanding that such person may have an interest in the event of the trial of any issue or of the suit in which he is offered as a witness.

This section thus far seems to me in broad comprehensive terms to remove all *incapacity from interest* from any one who might give evidence; that was the ground of exclusion formerly as applicable to a party who offered to be sworn on his own behalf. He was not compellable to give evidence against himself, and the section without the proviso seems to contemplate that he might be compellable to give evidence; with the proviso this point is beyond a doubt.

The proviso, as I read it, was not intended to give any

additional right to any party, but rather to control the broad powers which were previously given in the clause. It in effect declares that the act shall not authorise or permit any party to a suit individually named in the record to be *called as a witness on behalf of such party*, but *such party may* in any civil proceedings be called and *examined as a witness* in any suit or action *at the instance* of the opposite party.

I think the latter part of the proviso as referred to above furnishes a strong, if not a conclusive, argument as to the meaning of the legislature. It does not say that a party may call his opponent as a witness for himself; if it had it might be contended (though I doubt if successfully) that the witness could only give evidence for the party who called him, and that he could not give evidence for himself. But framed as it now is, the section merely provides that a party may be *examined as a witness* at the instance of his opponent, there is nothing in it, or in the general principles of law to say that a witness may not be examined on any matter pertinent to the issue after he has been sworn in the cause.

To conclude my view of the statute as applicable to the point under discussion amounts briefly to this. By its provisions all persons, whether parties to a cause or not, may be called as witnesses and give evidence, but a party to the cause cannot be such witness unless called by his opponent.

When a witness is once placed in the box I see no reason why he may not give the jury all the information he has sworn to give touching the matters in question in the suit. The view taken by Mr. Taylor in continuation of the passage already quoted from, seems to me to accord with what I now contend for, he says, "When it was requisite that the substantial, though not the nominal party, in the cause should be called by his adversary for the sake of formal proof only, it was held that he was thereby made a witness for all purposes, and might be cross-examined to the whole cause." He refers to *Morgan v. Brydges*, 2 Starkie Rep. 314, which bears out the doctrine stated, and to *R. v. Mur-*

phy, 1 Arm. Mac. & Og. 206, which last authority I have not yet seen.

I am clearly of opinion that the plaintiff, in the case before us; having called the defendant and he having proved payments to the satisfaction of the jury to the amount of £12, that the rule allowing that sum to be added to the verdict found by the jury in the court below ought not to be allowed to stand, and that this appeal should be allowed, and the rule *nisi* in the court below should be discharged.

HAGARTY, J.—I wish to rest my decision of this point on the broadest ground. A party to a suit is not a competent witness in his own behalf, and merely on his own motion. Our law, I presume, considers him disqualified by interest from giving a fair narrative to the jury of matters possibly fully known only to himself, and deems it a lesser evil to rest their decision on testimony that may balance its want of directness by its possibly superior credibility. I stop not to question the wisdom of the law, but accept it as it is. It can have no other logical foundation than want of faith in human nature when truth does not square with interest. Granted his good faith, the man who positively knows the facts of a disputed point, must be the proper medium to reflect them in their clearest light on those who must accept them as the basis of decision.

The law declines to risk the enquiry on the fidelity of the interested litigant. The opponent, however, for reasons satisfactory to himself, presents him to court and jury as worthy of credence for *his* purposes. To my mind the conclusion is irresistible that the opponent once offering him as a faithworthy witness on any point involved in the trial, at once removes all incompetency from supposed inability to sacrifice interest to truth, and that he forthwith becomes not merely a compellable, but also a thoroughly competent witness for every purpose on all the facts then in issue in the cause, however diverse and distinct may be the issues to be disposed of.

I am willing to accept the illustration offered in the court from which I have the misfortune to differ, and to hold that

if in the same suit one issue be as to the execution of a bond, and the other as to a charge of slander, and the plaintiff avail himself of his undoubted right to make defendant a compellable witness to disprove the plea of *non est factum*, he therefore removes all objection to his adversary as a competent witness to prove or disprove any fact connected with the other issues as to slander or other disputed matter.

I think a party to a suit is necessarily either a competent or an incompetent witness to all the matters involved in any one trial as a whole, and that his incompetency once removed for any purpose, is gone as to all.

No separation of competency as to parts of the matters to be tried is intelligible to my mind, nor can it be, I think, to a jury anxious to have the truth from the surest and most reliable sources. But for the judgment of the majority of the Court of Queen's Bench, which makes me pause long in maturing my opinion, I would entertain no shadow of doubt on this point.

I think we must allow the appeal, as our decision is final.

Per cur.—Appeal confirmed.

SMITH ET AL. (APPELLANTS) V. FOSTER (RESPONDENT.)

Bail bond—Custody of debtor when bond taken—Appeal books—Setting down for argument.

On an action on a bail bond given by the defendant S. and two others as sureties for him, with the usual conditions, it was contended on the part of the defendants that the bond was void, as the defendant S. while he was in close custody under the writ, and when the bond was executed, was not a debtor *confined* in the gaol of the county upon execution, &c.

Held, that it is not necessary that a debtor be actually conveyed to gaol before bail can legally be taken by sheriff.

Appeal books in this cause were set down for argument during Michaelmas Term, (on a decision given the previous county court term,) which were defective, and the court refused to hear the cause on that account, but no motion was made by the respondent's counsel to strike out the appeal; the appellant then set down the case to be heard the following term, which coming on for argument, the respondent's counsel moved to dismiss the appeal peremptorily, and the court refused the motion. *Draper, C. J.*, being of opinion that if time allows, the case should be set down for argument during the term succeeding that in which the decision of the court below was given, but no formal judgment was given on the point.

APPEAL from the County Court of the County of Oxford.

This action was brought on a bail bond given by the defend-

ant Smith as principal, and by the defendants Balsby and Wilcox, as bail or sureties for him to the sheriff of the county of Oxford, conditioned that if Smith should observe all notices, &c., of the court touching or concerning him, &c., and that the bail should produce Smith whenever they should be required on reasonable notice, and Smith should within 30 days from the execution of the bond procure the same or any other that might be substituted for it to be allowed, and such allowance to be endorsed on the bond within thirty days, then the same should be void.

The breach assigned in the declaration was, that neither of the defendants did within thirty days procure the bond to be allowed, nor was it allowed. Whereupon and after such default the sheriff duly assigned the bond to the plaintiff. The defendants pleaded, that after Smith was arrested, and while he was in custody under the writ, and at the time when the bond was executed Smith was not a debtor confined in the gaol of the county of Oxford on execution, or upon mesne process. To which the plaintiff replied, that after the arrest and while Smith was in the actual custody of the sheriff, the defendants made and executed the bond, and so the plaintiff says the bond was and is valid in law under the statute.

Demurrer, because the arrest and custody in the declaration mentioned was not such an arrest and custody as entitled the sheriff to take the bond.

The appeal books put into court did not contain either the grounds of appeal or the decision of the judge of the court below, which latter was in favour of the plaintiffs.

D. G. Miller, for the appellant, cited *Campbell v. Lemon*, 2 O. S. 401, Con. Stat. U. C., p. 282, secs. 24, 27, 28, 29, 31, 32, 34, 35.

Beard, contra, contended that the appeal could not be heard, it not having been properly set down. The court however heard the argument, subject to the technical objection. He cited Con. Stat. U. C., p. 92; *Simpson v. Great Western Railway Co.*, 17 U. O. Q. B. 57; *Ruttan v. Vandusen*, 10 U. C. Q. B. 620; *The King v. Justices of Wills*, 13 East. 352; *Haines v. The East I. Co.*, 11 Moor, P. C. C. 39.

DRAPER, C. J.—The learned judge of the court below gave judgment in favor of the plaintiff on the demurrer in September or October, 1860. The defendants thereupon appealed, and set down the appeal for hearing on the second day of the following term (Michaelmas.) On that day the court refused to hear it, because no reasons for appeal were marked on the appeal books. The plaintiff's counsel did not, however, move then to have the appeal dismissed; and during the same term the defendants again set down the appeal to be heard on the first paper day of the following term. The plaintiff's counsel then moved to dismiss the appeal peremptorily, which the court refused, the motion being for a rule absolute in the first instance.

It is not necessary to give any formal judgment on this point, as the appeal has been argued. My own view is, that, if time allows after the judgment of the county court is given, the appeal should be set down to be argued on one of the paper days in the term next after such judgment given.

As to the appeal itself:

No person can be arrested on a *ca. sa.* unless he has been virtually charged with fraud, as for intending to leave the province to defraud his creditors, or for making away with or concealing his effects to prevent their being taken in execution.

When arrested, it was, I think, under the C. L. P. Act, 1856, the sheriff's duty to take the debtor to gaol, after which, provided he gave the required security, he might get the benefit of the gaol limits. The condition of the bond he had to furnish related exclusively to his position as a debtor in execution. But the C. L. P. Act of 1857, introduced a new condition to the same bond, one not for the protection of the interests of the creditor, but for the ease of the sheriff, and as I think to some extent of the debtor also, and this was that the debtor should within thirty days from the delivery of the bond procure it to be allowed by the judge of the county court, and upon the judge endorsing the allowance on such bond, the sheriff was discharged from all responsibility respecting the debtor, and if there were any breach of the condition the sheriff might assign the bond to the plaintiff in the action, just as in the former act.

I think this change was intended, so far as the taking the bond with the additional condition is concerned, to bring the law to the state in which it was under 16 Vic., 175, sec. 7, *et seq.* But this intention has been very imperfectly expressed. It has not been expressly stated, that one object of the new condition was to prevent the necessity of taking the debtor to gaol, as was expressed in the repealed act, the only part of the effect of the change that is distinctly stated being *that* for the relief of the sheriff; and though the words used for that purpose are, taken alone, plain enough, yet it seems to have been overlooked, that if by the mere fact of the allowance being endorsed, the sheriff is discharged from all responsibility respecting the debtor, the plaintiff in that cause is left without a remedy, for if his debtor escapes, he cannot sue the sheriff, who is "discharged from all responsibility," and the act gives him, in terms at least, no means of compelling the sheriff to assign the bond, and if the sureties become worthless, the plaintiff has no remedy.

This is certainly not a satisfactory state of the law. I have recently pointed out other difficulties in construing the act as it now stands, and some other apparent anomalies in it. It is to be hoped some necessary amendments will be made.

The best opinion I can form, though with considerable doubt, is, that this bond, though given when the defendant had not been conveyed to gaol, but still while he was under arrest and in the actual custody of the sheriff under the *ca. sa.*, is not void. I think such must have been the intention of the legislature when they interpolated the new branch of the condition—into the condition as it originally stood—and that they intended that the debtor should get the benefit of the limits if he gave a bond with sureties satisfactory to the sheriff, immediately on his arrest. The necessity for the sheriff taking time to make the fullest enquiries into the sufficiency of the sureties being diminished by the nature of the new condition.

I think, therefore the appeal should be dismissed with costs.

HAGARTY, J.—I think that in supporting the validity of

the bond in this case, we are only applying a fair and reasonable construction to the statute, and carrying out the true intention of the legislature. I think that so long as the debtor is in the actual custody of the sheriff within the gaol limits, he may give the bond directed by the statute, and that we should be adhering far too rigidly to the letter of one of the clauses (the 25th) to make it a condition of validity that the debtor must be inside the walls of the goal building. I do not understand that if a bond be given under the 25th section, the debtor has to remain in gaol till it is allowed by the judge. If therefore he be on the limits, and fail to get it allowed, the 27th section declares that he may have another bond made to the sheriff in the same terms and under the same conditions, &c., and may move in like manner for its allowance. Nothing is said as to the debtor being within the gaol in giving this 2nd or substituted bond. The 78th section should be read, I think, as relating in the first instance to the 25th section.

I think that we are carrying out the true intention of the legislature in dismissing the appeal.

Per cur.—Appeal dismissed.

CHISHOLM ET AL. V. POTTER.

Ship—Registry of—Sale of—Imp. Stat. 17 & 18 Vic., c. 104—Con. Stat. of Canada c. 41.

Held, that a builder of a ship is not compelled by the statute to have his vessel registered before he can make a valid sale of her.

2nd, that a written instrument is not requisite to pass property in a vessel which it is not necessary should be registered under the act.

INTERPLEADER issue to try whether certain goods at the time of delivery of defendant's writ to the sheriff were plaintiffs' as against defendant.

The evidence of Thompson Smith, a witness for the plaintiffs, was taken by consent, and is as follows :

I know John Potter the judgment debtor; he was a ship-builder, building vessels for others and himself; he empowered me to sell the vessel in question in this suit on the 9th of August, 1859; the vessel was called the Royal Albert; I sold it on the 1st of February, 1860, to the

plaintiffs; I gave possession on that day; the price was \$5000, with interest, at seven per cent. from the 1st of February, payable, \$1500 cash, and the balance by four notes, dated the 1st of February; the notes have been paid as they matured, the two first being paid, and the other two still unpaid, and not due. I deal in vessels myself; I considered the price a fair one; the defendant never executed the deed of assignment from John Potter to me. The sale was made *bona fide* by me to the plaintiffs.

Cross-examined.—I owned the vessel by assignment from Potter under a deed of assignment for the benefit of creditors. I received my authority to sell the vessel by the assignment; there was another assignment by Potter to me executed about the 27th day of August, 1859; the first was thought to be illegal, and therefore the second one was executed; I got possession of the vessel on the 9th of August, or immediately after, and I continued in possession until I sold; the vessel, I believe, is not registered; I never registered her; I cannot say that I saw the plaintiffs on the 1st day of February, or that anything was actually done about the sale on that day; we had been negotiating for a sale of the vessel for four or five months before the sale took place. Some time during the month of February we closed the bargain and agreed upon the price, and terms of payment. There was no written memorandum of the bargain, and I do not believe there was any writing about it except the notes they gave me, and a receipt for the first instalment, or some such document which I probably gave them, specifying the terms. The first of the purchase money was paid on the 3rd of April, 1860, with interest from the 1st of February, 1860; when I agreed with the plaintiffs as to price, it was agreed that interest should be calculated from the 1st of February, as we considered the sale had then taken place. The vessel was in Oakville harbour during the winter until she sailed in the spring; no one lived on board; I live in Oakville, and the plaintiffs, except Barnhart, live in Toronto; he lives at Streetsville; the captain lived in Oakville, and I relied upon him to look after the vessel; I gave the plaintiffs the keys

of the vessel when they wanted to fit it out; I think they were fitting out before they paid me the money; I believe that the plaintiff Hagerman is a member of a firm who are creditors of John Potter, because he formerly was a partner of one of the partners in that firm. All the plaintiffs knew that I held the vessel as assignee of John Potter; none of them ever asked me to see the assignment; they had been negotiating with Potter for the purchase of the vessel before he assigned to me; the vessel had cost about \$8000, and had been running for one season and part of another, when Potter assigned to me; the plaintiffs knew that Potter was insolvent, and had made an assignment for the benefit of his creditors when they bought from me; I carried on Potter's business by running the vessel after the assignment to me until the end of the season, and have acted as assignee by receiving and paying money. I have declared a dividend of 12c. in the dollar, and have paid it to all who executed the assignment; I sent the two letters marked "A." & "B." to the defendant, and similar letters to other creditors. On the 9th of August, 1859, the vessel was not in Oakville or Toronto, but in Hamilton, or on her way from Oswego; I do not think she was in Oakville on the 27th of August either; during that season she traded from Hamilton to Oswego and other ports; she never stopped her usual trading in consequence of the assignment; after the assignment the captain made his reports to me instead of to Potter; the same captain continued to command the vessel until after the sale to the plaintiffs; the vessel was built by Potter in Oakville, and I believe he is a British subject; he has lived in Oakville for many years; the vessel far exceeds fifteen tons burthen.

It was agreed that a verdict should be entered for the plaintiffs subject to the opinion of the court on the foregoing evidence and on the two assignments and the receipt referred to in Mr. Smith's evidence.

1. The defendant objected that no property passed to the plaintiffs on the foregoing evidence.

2. That a sale of a vessel owned and built in Canada is void unless made by bill of sale under the Ship Registry

Act, duly filed according to the act, and that a delivery such as proved in this case cannot pass the property in a vessel.

3. That no property in the vessel passed to Smith under the assignments, or either of them, they being both void as preferential assignments under the statutes of Elizabeth, and the provincial statute of 20 Vic., ch. 3, as they contain a release clause, and a limitation of time for execution by creditors, illegal provisions for continuing business, no sufficient change of possession contemporaneous with the assignment, and the filing of the assignment is insufficient, the affidavits being defective.

4. That the sale of the vessel to the plaintiffs by Smith is void for the foregoing reasons, and there being no memorandum thereof in writing or other legal sale.

Eccles, Q. C., and McNab, for plaintiffs.

Hector Cameron for defendant, cited *Con. Stat. of Canada*, p. 547.

DRAPER, C. J.—The principal objection is, that a sale of a vessel (above 15 tons burthen) is void unless made by bill of sale under the Ship Registry Act, duly filed according to that act, and that a delivery such as is proved in this case cannot pass the property in a vessel.

Mr. *Eccles*, on behalf of the plaintiffs during the argument, expressly gave up any claim or title derived under the two deeds of assignment spoken of by the witness Thompson Smith, but he insisted that this witness had the possession of the vessel under and by authority of John Potter, who built her, and had John Potter's authority to sell her, and did sell and actually deliver her to the plaintiffs early in the year 1860. James Potter's execution against the goods of John Potter was not delivered to the sheriff until the 14th of June, 1860. There is no ground for surmising that Smith had not John Potter's authority to sell this vessel, so that the question is, whether the sale without writing, beyond the receipt given by Smith for the consideration, passed the property. The vessel has never been registered under our statute.

The case of *Benyon v. Cresswell*, (12 Q. B. 899,) certainly establishes, that where a vessel is not of that class, that registry is necessary under the Ship Registry Acts in England, in order to entitle her to the privileges of a British ship, a written instrument is not necessary in order to her being transferred to a purchaser. The difference between that and the present case is, that the vessel is one which comes within the provisions of our statute, if registry be compulsory under it.

Upon the best consideration I can give that act, I have come to the conclusion that the builder of a vessel is not *compelled* thereby to have his vessel registered before he can make a valid sale of her. And as the evidence shews that John Potter was the builder; that the sale to the plaintiffs was by his authority; that the plaintiffs were *bona fide* purchasers for value, and obtained actual possession as such some months before the defendant's *fi. fa.* came into the sheriff's hands, I think we ought to hold that the property pass to them.

But the imperial statute 17 & 18 Vic., ch. 104, commonly know as the "Merchant Shipping Act," 1854, has to be considered. And sec. 19 of that statute enacts, "Every British ship must be registered in manner hereinafter mentioned," with three exceptions, none of which touch this case, while the 55th section provides that a registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships shall be transferred by bill of sale.

The 98th section of that act might well apply to vessels built on the inland waters. See also sec. 103, sub-sec. 3, and sec. 107.

Nevertheless, the language used in that act is treated by text writers as not affecting the conclusion that before ships and vessels are registered, the property in them may be transferred in the same manner as in the case of any other chattels, and I do not find in any reported case any thing at variance with that conclusion. The language of our own act is no stronger. I think, therefore, the plaintiff is entitled to the *postea*.

Per cur.—Postea to plaintiff.

See the imperial statutes 8 & 9 Vic., ch. 89, sec. 4; sec. 12 of 3 & 4 Wm. IV., ch. 54; sec. 2 of 3 & 4 Wm. IV., ch. 55; 8 & 9 Vic., ch. 88, sec. 10, 13, 14; *Reid v. Fairbanks*, 13 C. B. 692; *Duncan v. Tindall*, 13 C. B. 258; *Biddell v. Leeder*, 1 B. & C. 327; *Ex parte Yallop*, 15 Ves. 60; *Benyon v. Cresswell*, 12 Q. B. 899; *Smith v. Brown*, 14 U. C. Q. B. 1; *Wendover v. Hogeboom*, 7 John, 308; *Hatch v. Smith*, 5 Mass, 42; *Weston v. Penniman*, 1 Mason, 306; *Merchant's Shipping Act*, 17 & 18 Vic., ch. 104, secs. 19 & 55.

LAKE (APPELLANT) V. BIGGAR (RESPONDENT.)

Replevin—Tender—Lien.

One C., being indebted to the defendant, assigns to him with plaintiff's consent his lien on a buggy owned by plaintiff, on which he C. had a claim for repairs amounting to \$25 25c. The plaintiff subsequently demanded the buggy, but without any tender or offer to pay the lien. Upon replevin, *Held*, that the defendant was entitled to succeed, there being no evidence of a tender or satisfaction of the lien.

APPEAL from the County Court of the County of Brant. Declaration stated that defendant unjustly detained plaintiff's buggy.

Plea on equitable grounds that said buggy was repaired &c., by one John M. Collver, for plaintiff, the cost of which amounted to \$25 25c.; that said Collver was largely indebted to defendant, and assigned his lien for the said \$25 25c. to defendant, which sum remained unpaid, and defendant detained buggy, &c., which is the detention complained of.

On the trial before the judge of the court below the following evidence was given material to the decision.

Charles Biggar for the defendant (Biggar.)

I have no interest in this suit; I was and am a clerk in defendant's store; one J. M. Collver had a claim of twenty-five dollars and twenty-five cents against Lake, the plaintiff; for repairs to a buggy, which claim he wished to transfer to the defendant. Collver was detaining the buggy for these repairs; I presented the account for the repairs to Lake, and he said it was correct, and afterwards Lake told me to

take the buggy and hold it until the repairs were paid. Collver also had wished me to do this, which Lake knew; I took the buggy from Collver's shop and held it about eight months; defendant sued Lake in the division court for the repairs in Collver's name. Lake then replevied the buggy and afterwards paid the money for the repairs into the division court.

Cross-examined: My father, the defendant, at first refused to take the account from Collver; the day before Lake replevied he told me he had paid the repairs, and wished the buggy, and that he had my receipt for the amount. I told him to show me the receipt, or any receipt, and he should have the buggy; he did not (the writ of replevin issued on the 2nd day of October, 1860); it was replevied on the 11th day of October; I got the buggy from Collver, drew it from Collver's shop; it was there that the arrangement with Lake was made; the buggy was not out of my possession from the time I got it until replevied.

John M. Collver: I repaired the buggy; I kept it for my claim a while and then transferred it to Mr. Biggar as the last witness has stated. The amount of the account for repairs was twenty-five dollars and twenty-five cents.

Cross-examined: It (the account) was transferred to defendant last spring; the buggy was then at my shop; it was not out of my possession from the time Lake left it until I let Mr. Biggar have it; Lake knew I had transferred the account to Biggar; I told him I paid Lake for the flour I got of him by other work; I owed Mr. Biggar for much more than Lake's account; I did not get an order from Biggar to give up the buggy to Lake; I got an order that Lake had given Biggar an order on Kerr & Co. for thirteen dollars; the buggy was not in Lyons' possession.

Charles Biggar: I got the order above for thirteen dollars and it was returned to Lake the same evening. Lake said he would get an order for the correct amount; I assisted twice in taking the buggy to Lyons' and helped to take it away; Lake was sued in the division court about the first day of September.

For the plaintiff:

James Herron: I went into the defendant's with plaintiff for the buggy; Biggar said he would not give it up as he was obtaining an execution against Collver, and was intending to levy on the buggy; this was in September or October; it was a short time before the buggy was replevied; the buggy has since been repaired again.

John Wallace: I took the buggy to Collvers for repairs a year ago this past fall; I saw it afterwards at the shop; Collver was showing it to Lake; this was last summer; Lake was going to pay Biggar's claim and get the buggy; Collver seemed to have possession of it.

The jury having found for the defendant, a rule for a new trial was granted and argued, upon which the following judgment was delivered in the court below:

"This was an action of replevin for unjustly detaining the plaintiff's buggy. The defendant pleaded on equitable grounds that the buggy was held by one J. M. Collver who had a lien on it for repairs that he had done on it to the amount of \$25.25, and that Collver owed the defendant a large sum, and with the plaintiff's consent he delivered the buggy to the defendant as a part security, for which he owed the defendant, and that it was agreed by the plaintiff, Collver, and the defendant, that the defendant should hold the buggy until the \$25.25 due for the repairs was paid to him by the plaintiff.

"The plaintiff took issue on the plea, and a verdict was found for the defendant. During sittings in term the plaintiff moved for a new trial on the grounds that the verdict was contrary to law and evidence, and for misdirection.

"The defence set up by the plea was fully proved, not only by the evidence of Charles Biggar, but also by that of Collver, and their testimony on that point is corroborated by Wallace, one of the witnesses for the plaintiff. It was also proved that the plaintiff paid Biggar the amount of these repairs after the commencement of this action, so that it is only the costs that are now in question.

"The evidence at the trial shows that the buggy in question was placed in the defendant's possession with the con-

sent of the plaintiff" who agreed that the defendant should hold it until the plaintiff paid for the repairs done upon it. This was a lien created by the act and agreement of the parties themselves. Subsequent to this the plaintiff recognising the defendant's right to retain the buggy for the repairs agreed to pay them by an order on Kerr & Co., but did not do so, and when the plaintiff went to the defendant with the witness Herron, and demanded the buggy, he knew the nature and amount of the plaintiff's claim, and made no tender of it, nor did he offer to pay it or state that he was ready to do so. Herron says that the defendant refused to give up the buggy, saying he was getting a judgment against Collver and would seize it on that. This evidence of Herron's is not corroborated by the other witnesses, nor is it consistent with their statements. It appears that Biggar was about taking proceedings against the plaintiff in Collver's name to recover the value of the repairs, and it was most likely of this suit that he was speaking. His having a lien on the buggy would not prevent his seizing it under an execution against Lake for the debt which constituted the lien, nor would his asserting such a right be inconsistent with his lien or a waiver of it. But, assuming that Herron is correct in his statement of what Biggar said, does it show that he waived his lien on the buggy, and dispensed with a tender? I think not. This case is distinguishable from those of Boardman v. Sill, 1 Camp. 410n., and Weeks v. Goode, 3 Com. B., N. S. 367. In those cases the lien afterwards set up was one created by law, and not by the agreement of the parties, as in this case. Besides, in those cases, it does not appear that the plaintiffs, when they demanded the property, knew of the lien that the defendants afterwards claimed.

"The present case is more like that of Scarfe v. Morgan, 4 M. & W. 270, where the defendant, in addition to the legal lien that he had on the mare sought to detain her for another matter. It was held that this did not dispense with the plaintiff's tendering the amount really due. The case of Jones v. Tarleton, 9 M. & W. 675, is also like the present case. There the plaintiff, in demanding the goods

of the defendant, offered to pay the charge for carriage, but the defendant claimed to hold them until a general balance was paid him. The plaintiff, without making a tender, brought his action. It was held that as the plaintiff had offered to pay the regular lien, the defendant, claiming to keep the goods on another ground, dispensed with the plaintiff's making a formal tender of the amount of the true lien.

"So, in the present case, if Lake had gone to Biggar offering to pay the amount of the repairs, but Biggar had refused to give up the buggy claiming to hold it on another ground, then, I think that would have dispensed with Lake's making a formal tender of the amount due, but he could have brought his action as in the above case of Tarlton v. Jones. But here, although Lake knew the amount that Biggar was entitled to hold the buggy for, he neither tendered it nor offered to pay it before bringing his action. I think the verdict should stand. As regards the objection, that the jury was misdirected, I do not think there was any misdirection. The plaintiff's counsel objected to my charge at the trial, and contended that I should have charged the jury that the defendant waived his lien for repairs by claiming to hold the buggy to satisfy an execution that he was recovering against Collver. I declined so charging the jury; and I could not do so, as it was a matter for the jury themselves to consider whether they believed Herron's statement, and whether Biggar really did set up a claim to the buggy for anything but the amount of the account for repairs. The impression I received from the evidence was certainly against the plaintiff on that point. The rule *nisi* states that I told the jury that the defendant was entitled to a verdict. This is a mistake—I merely commented on the evidence, and left the whole matter to the jury.

"Rule *nisi* discharged."

From this judgment the plaintiff appealed on the ground that the rule *nisi* granted herein should have been made absolute on the grounds that the said verdict was contrary to law and evidence, and on the ground that the learned judge did not properly charge the jury in this; that

it should have been left them simply to say whether the defendant set up a claim other than the one against the plaintiff, and if he did, that it was a waiver of his right to tender, and the plaintiff was entitled to recover, whereas the learned judge told the jury that as there was no offer by the plaintiff to pay the money, it did not amount to a waiver, and the defendant was entitled to recover.

M. C. Cameron for the appellant, referred to the cases cited in the judgment in *Clark v. Gilbert*, 2 Bing. N. C. 357, *Legg v. Evans*, 6 M. & W. 42; *Dirks v. Richards*, 4 M. & G. 574; *Weeks v. Goode*, 6 Com. B., N. S., 367.

Hardy contra.

HAGARTY, J.—I am quite satisfied with the view taken by the learned judge in the court below, both as to the law and the facts of this case.

I can see nothing in the evidence to induce the belief, either that a tender of the admitted lien was actually made, or that defendant in any way dispensed with its being so made, or spoke or acted so that a jury could have safely concluded that Biggar being apprised of plaintiff's desire or intention of paying him for his lien, dispensed with any offer or tender of the money.

Herron's evidence is this: "I went into the defendant's with plaintiff for the buggy. Biggar said he would not give it up, as he was obtaining an execution against Collver, and was intending to levy on the buggy."

I think it would be stepping beyond all the authorities to hold this such evidence of tender, or waiver of tender as would suffice in a case where the lien is admitted to exist.

I may note that in answer to the plea of lein there is no replication confessing and avoiding by shewing a tender or any waiver or dispensation therewith.

Per cur.—Appeal dismissed with costs.

BANK OF UPPER CANADA V. LIZARS.

Bill of exchange—Recovery of judgment against the drawer and acceptor—how far an answer in a subsequent action against the endorser.

Upon an action brought by the endorsee against the (3rd) endorser of a bill of exchange,

Held, that the signing of final judgment in a previous action on the same bill of exchange in which all parties thereon were sued and served, (and judgment of *non pros* not signed or a discontinuance entered as to any,) but the special endorsement, and judgment obtained thereon, only shewed a cause of action against the drawer and acceptor, did not prevent the subsequent recovery in a separate action against the endorsers.

DECLARATION by endorsees against the endorser of a bill of exchange dated the 14th of February, 1857, drawn by P. Phipps on R. Windsor, payable to Phipps or order at 60 days after date, for £300, accepted by Windsor, and endorsed by Phipps to one Daly, who endorsed to defendant.

Plea, that on the 23rd of June, 1857, plaintiffs issued a writ of summons out of the Queen's Bench, against one Paul Phipps, Richard Windsor, T. M. Daly and defendant, specially endorsed thus: "The following are the particulars of the plaintiff's claim. A draft drawn by Paul Phipps on R. Windsor, dated the 14th of February, 1857, due 60 days after date, for the sum of £300. The Plaintiff claims interest on £300, from the 18th day of April, 1857, until judgment. —N. B.—Take notice that if a defendant served with this writ within Upper Canada, do not appear according to the exigency thereof the plaintiff will be at liberty to sign final judgment for any sum not exceeding the sum above claimed with interest, and the sum of £3 10s. for costs, and issue execution at the expiration of eight days from the last day for appearance.

The plea then averred the identity of the causes of action in the two suits, and that in the former suit he was jointly liable with the defendants Phipps, Windsor, and Daly, and the plaintiff by proceeding in the former suit, could have obtained final judgment thereon against all of the defendants named in the writ of summons including him. That defendant and T. M. Daly appeared to that writ, and Phipps and Windsor did not appear, whereupon plaintiffs signed final judgment, and issued execution against them and abandoned the action against defendant and Daly. By

means whereof plaintiffs released him from all causes of action in respect of the said bill of exchange.

Replication, that defendant was not liable with Phipps, Windsor and Daly, as upon a joint contract, but was merely made liable with them by virtue of the statute in that behalf for the purposes of the former suit; and that plaintiff did not, by taking judgment in the former suit, release defendant from plaintiffs' claim in respect of the bill of exchange.

Demurrer, because the C. L. P. Act makes no difference between joint actions on a joint and several liability, and upon a joint liability, in either case the abandonment of any defendant operates as a release of any further claim.

The plaintiff took exceptions to the plea, that it did not shew whether the judgment was recovered before or after the commencement of this suit, or the nature of the judgment, and was neither a plea of judgment recovered, or of a release, or of accord or satisfaction.

That an abandonment of an action is no abandonment of a right of action.

That the plea shewed no persons liable by the special endorsement, other than Phipps and Windsor, and neither Daly nor defendant are referred to as indorsers in the special endorsement, and that judgment could not have been signed against all the defendants in that suit under the special endorsement.

A. Crooks supported the demurrer, citing 1 Sand. 207 N.; *Bowden v. Horne*, 7 Bing. 716.

M. C. Cameron, contra, contended that the language of the act abandoned the action, not the right of action. He cited *Kerr v. Hereford*, 17 U. C. Q. B. 158; *Bishop v. Powell*, 6 T. R. 616.

DRAPER, C. J.—This action differs materially from what is ordinarily understood as a joint action, in which the plaintiff declares against all the defendants upon a cause of action giving him the same right to recover against all as against any one—the same state of facts charging all of them.

Here it is evident the plaintiff could not declare against

the four named parties without shewing a separate cause of action against each.

Against the drawer, he need only shew the drawing of the bill, non-acceptance, or non-payment and notice.

Against the acceptor, the drawing and acceptance.

Against one endorser, two additional facts, that the payee, who is also the drawer, endorsed to him, and that he also endorsed.

Against the last endorser, the additional fact of his own endorsement.

A declaration framed under the statute against four such defendants must charge them as jointly and severally liable. Separate defences are open to them, and a verdict may be rendered by which one or more will be discharged upon *distinct issues*, without interfering with the plaintiffs' right to recover against others. It might happen that the endorser who only denied notice might have a verdict rendered against him and not be able to avail himself of the acceptor's defence who succeeds on a plea traversing the acceptance.

Without saying that the several defendants *must* plead severally there is no doubt they may, and the success or failure of one on a plea, pleaded solely by him, would have no influence on the liability of the others. Even if on a plea of set-off the last endorser got a verdict, I do not see that the plaintiff would be debarred from taking a verdict for the full amount against preceding parties, though he might be restrained from levying it, at least for his own benefit, though possibly the court might permit payment to be enforced for the benefit of the last endorser who had satisfied the bill, and to whom the preceding parties were liable.

Until judgment is entered, nothing in the proceeding is necessarily joint, except that the various parties are brought into court in one action.

This plea shews no joint judgment, and avers no judgment except against the drawer and acceptor. I think that on the summons and special endorsement pleaded, the plaintiffs could not have entered a judgment against all the four defendants by default, for the special endorsement shews no claim against any one but the drawer and the acceptor. The

forms given by the Common Law Procedure Act state the character in which a defendant is charged upon a bill or note.

Whether it be regular to sue out a writ of summons against four, and specially endorse the writ against two only, is not now the question. Assuming it to be a good writ and endorsement against the two, it cannot be more than a good writ against the other two. Then all that appears is that the plaintiffs took a judgment against the drawer and acceptor mentioned in the special endorsement, and have never declared against the other two named in the writ, who, for all that appears there, were not parties to the bill at all. By not declaring within the prescribed time, the plaintiffs are out of court, and these defendants who have appeared might have signed judgment of *non pros*, but that would have left the plaintiffs in a situation to bring another action, and I do not understand why they should be in a worse position because the defendants after appearing did nothing.

And if the plaintiffs, before entering judgment against the drawer and the acceptor, had as to the endorsers entered a *nolle prosequi*, I see no reason why they could not still bring this action. See 1 Saund 207, N.

In my opinion the plaintiffs should have judgment on this demurrer.

Per cur.—Judgment for plaintiffs.

HENNESSEY ET AL. V. WEIR.

Covenant—Condition precedent—C. L. P. Act, sec. 106.

Declaration stated that plaintiffs covenanted with defendants to do certain works within a limited period, and in a workmanlike manner, &c., with power to defendant by six days' notice to take the works out of plaintiff's hands in default of the rate of progress being sufficient to ensure the completion of the said works within the specific time. But omitting to set out the words "It is also understood that the work is to be carried on unceasingly night and day with sufficient force to ensure its completion within the limited time." Averment, that though plaintiffs fulfilled the conditions precedent, the defendants did take the works out of the plaintiff's hands without notice and without just cause, &c., whereby damage, &c.

Held, on motion for nonsuit to be no variance, as by 106 sec. of C. L. P. Act, 1856, the averment of performance by plaintiff of conditions precedent, not denied by defendants, is sufficient.

DECLARATION on a covenant dated the 7th of March,

1859, between plaintiffs of the first part, and defendant of the second part, whereby plaintiff covenanted that they would, at their cost and charges furnish materials for, and execute and complete in a workmanlike manner, and to the satisfaction and acceptance of the resident engineer of the Port Sarnia Extension of the Grand Trunk Railway, all the clearing, close-cutting and gravelling, earthwork, bridge, masonry, and masonry in culverts, on the line of the said railway, commencing at Fish Creek running westward about a mile, more or less, to a certain stake, No. 414, as shewn on the profile of the railway, and that they should make, build, and erect all other structures on the line of the said railway according to the plans to be furnished to them, and that the whole of the work contracted for should be performed in strict accordance with the specification attached, and for the prices named, and they further covenanted with defendant that they would in all respects, finish and complete the work in accordance with the indenture, and the specifications thereto attached on or before the 7th day of May, 1859.

And the defendant covenanted he would pay the prices in the indenture mentioned to the plaintiffs for work, and that all payments should be made monthly to the plaintiffs in six days after the defendant should have received payment from the principal contractor, and on the written estimate of the engineer in charge of the works of the amount of work done by the plaintiffs, and that it should be lawful for the defendant to withhold and retain from the plaintiffs 10 per cent. from each monthly estimate until the completion of the works, and that the same should remain in the hands of the defendant as security for the full and perfect completion of the work to the satisfaction of the defendant, and the acceptance of the engineer in charge, and the amount so retained, together with any balance remaining unpaid as shewn by the final estimate should be paid to plaintiffs within fifteen days after the work should have been delivered up and accepted. And further, that if at any time or times during the progress of the works, it should appear to the defendant that the establishment employed or the rate of progress in the said works or any part thereof should not respective-

ly be such as to ensure the completion of the said works within the time thereby limited, or if the plaintiffs should from time to time, or at any time pursue any course violating the provisions or evident import of the said contract the defendant, on giving six days' notice in writing to the plaintiffs or their agent in charge of the works should have power at his discretion either to take the work, or any part thereof out of the hands of the plaintiffs, and to re-let the same or any part thereof, with or without further previous notice to the plaintiffs to any other person willing to undertake the completion of the same (as by the said indenture, reference being thereto had, will more fully appear.) The plaintiffs then averred that from the time of the making of the indenture, they did well and truly perform and keep all things therein contained on their parts to be performed and kept, and did at their own costs and charges, furnish materials for and execute in a workmanlike manner, and to the satisfaction and acceptance of the engineer in charge all the works in the indenture set forth (until such time as they were interrupted and prevented in doing so by defendant as thereafter mentioned) in accordance in every respect with the terms of their said contract, and according to the tenor and effect of the indenture. Yet the plaintiffs say that the defendant did not, though often requested so to do, pay to the plaintiffs, the prices agreed upon for the said works either in the manner or at the times in the said indenture mentioned or otherwise, or any part thereof, though the defendant received payment from the said principal contractor, but has retained in his own hands and has refused to pay to the plaintiffs the same or any part thereof contrary to the meaning of the indenture, and defendant's covenant. And plaintiffs further say that before the time of the completion of the said work had expired, and whilst the works were in progress, and the establishment then employed by the plaintiffs, and the rate of progress in the works being then such as to ensure the completion thereof within the time by the indenture limited, and the plaintiffs not having in any way pursued any course violating the provisions or evident import of the said contract, and whilst the said

plaintiffs were in all things well and truly fulfilling and carrying on the said works in accordance with the terms of the said contract, the defendant, contrary to the tenor and effect and meaning of the indenture, and of defendant's covenant in that behalf and without previous notice to plaintiffs, took the works out of their hands and re-let the same to other persons, whereby the plaintiffs were wrongfully deprived of the works and of the profits that would have accrued to them by the carrying on and completing of the same, and plaintiffs claim \$700.

Pleas.—1st *Non est factum*.

2nd. Payment in goods and chattels.

3rd. Set-off for goods sold and delivered.

4th. 1st plea to 2nd breach, that after plaintiffs commenced the work they violated the contract in this, that the establishment employed by them and the progress of the work made by them were not such as to ensure its completion within the time limited therefore, wherefore defendant gave notice of his intention to take the work out of plaintiffs' hands after six days, which notice being verbal, the plaintiffs accepted as sufficient within the meaning of the indenture and waived a notice in writing of such intention, and after the expiration of the said six days the defendant did, pursuant to the indenture, take the works out of the plaintiff's hands, and re-let the same to Donald Robertson and others as he lawfully might, which is the breach in the declaration secondly assigned.

5th. 2nd plea to second breach, that he committed the same by plaintiffs' leave and license.

6th. 3rd plea to second breach on equitable grounds, that before he defendant committed such breach the plaintiffs voluntarily abandoned and gave up the works and declared themselves incompetent to perform the said contract, and requested the defendant to take the same off their hands and release them therefrom, and in compliance therewith, the defendant did take the said works off their hands and release them from the said contract and re-let the same, which is the breach secondly assigned. The case was taken down for trial at the fall assizes of 1860, for the County of Middlesex, before the Chief Justice of this court.

The agreement between the parties was put in and admitted.

Mr. Eccles, for defendant, then objected that there was an important omission constituting a variance between the agreement produced, and that set out in the declaration. The learned Chief Justice overruled the objection, but gave leave to the defendants to move to enter a nonsuit on this ground. The words referred to in the agreement not set out in the declaration were, "It is also understood that the work is to be carried on unceasingly night and day with sufficient force to insure its completion within the time limited."

The case proceeded and evidence was gone into to shew the quality of work done by plaintiffs, and the progress they had made when it was taken out of their hands.

On the other hand defendant called witnesses to shew the amount paid to plaintiffs, and that the progress of the work was such that they could not complete it, and that they had desired defendant to take the work off their hands and had waived the six days' notice required to be given under the agreement to enforce the forfeiture.

In charging the jury, his lordship referred to the contract, and stated that under it the defendant had a right, if in his judgment the plaintiffs were not proceeding with the work sufficiently fast, to take it out of their hands, and if he did not act unreasonably and capriciously, they were bound by his determination. That if the plaintiffs stated they could not do the work as they had contracted and as it was necessary in order to its being completed by the time limited, it shewed that defendant was not unreasonable in taking it out of their hands. It then became necessary to consider the question of the six days' notice as required by the contract in order to rescind it. Under the contract, if there was a forfeiture it extended not only to the doing of future work, but also to the earnings for past work, which would be an answer to the whole action. He however recommended the jury not to hold, even if the plaintiffs gave up the work and waived the notice, that that was a forfeiture and he thought it should not deprive them of payment for work

previously done. That such a forfeiture should only be enforced on a strict proceeding by defendant under the contract. (This part of the charge was objected to by the defendant at the trial, but the objection was not renewed on the argument.) He finally left it to the jury on the evidence as to the first breach to determine whether the plaintiffs had not done work for which they had not been paid, and the amount, and stated that plaintiffs were entitled to damages if the first breach was proven to their satisfaction. He also as to the second breach, directed if they were satisfied that plaintiffs had given up the contract, they thereby waived the notice referred to in the agreement. The jury gave a general verdict for the plaintiffs with damages for \$220 42½ cents.

In Michaelmas Term last, *Eccles*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit or verdict entered for the defendant pursuant to leave reserved, or why a new trial should not be had on the grounds of the verdict being contrary to law and evidence.

J. H. Cameron, Q. C., shewed cause during the term, and *Eccles* supported his rule.

RICHARDS, J.—As to the first breach there are no special pleas applicable to it, and unless the objection of variance taken at the trial can be upheld no other plea than *non est factum* being pleaded applicable to that point, the application for a nonsuit must fail. If the part of the agreement omitted to be set out in the declaration, and which the defendant contends ought to be inserted, be a mere matter of recital, I do not see how the omission can be urged as an objection to plaintiffs' recovery. All that was ever required before the Common Law Procedure Act was to set out the legal effect of the agreement, and if its legal effect was that the work should be done by the time limited, the plaintiff seems to have stated that sufficiently. If the provision that "they should work night and day," was a condition precedent to plaintiffs recovering, (which, however, I very much doubt,) then by the 106 section of the Common Law Procedure Act of 1856, the averment by plaintiff of performance

of conditions precedent, which defendant does not deny, seems sufficient. If the defendant considered that provision a condition precedent, he ought to have specified it in his plea and denied its performance by plaintiffs. One mode of testing if this provision is one which would prevent plaintiffs from recovering, is to suppose the work to have been completed within the time specified, and no work whatever had been done at "night," but all "by day," and that the work had ceased "at night," could the defendant have set up that working night and day was a condition precedent to recovering for the work which he had performed? I think not. No doubt if the plaintiffs failed to work night and day as they had agreed to do, defendant, by giving them the notice provided for in the contract, might have taken the work out of their hands, and in that way a forfeiture of the contract might have ensued. But if the work had been completed by the time mentioned in, and in other respects according to, the contract, omitting to work at night would afford no ground to defendant to resist the payment. I think, therefore, the defendant fails on the motion for a nonsuit.

As to the second breach, the evidence seems to shew that the issues as to it ought to have been found for the defendant, and unless the plaintiffs consent to the issues as to that breach being entered for defendant, there must be a new trial.

The jury appear to have allowed the plaintiffs for all the work done in March, though the defendant's witnesses stated that he had employed men to work the first week in March, and had paid them \$128 69½ therefor; this amount should be deducted from the plaintiffs' verdict, if it be true that defendant paid it for work done, as alleged, the first week in March, the only amount allowed the defendant appears to be for the goods furnished by him to the plaintiffs direct, about which there was probably no dispute. If it was left to the jury to decide, and they did decide as a matter of fact that the men employed and paid by defendant did not work on the plaintiffs' job the first week in March, or that the work they did was not included in the estimate of 1550

yards which the engineer stated was returned as done on that section in March, then the verdict on this point is correct; but if the jury consider that the work so done and paid for by the defendant was about equal to the damage, plaintiffs ought to recover for defendant's taking the work out of their hands, then that would be giving damages as to the second breach, the issues to which we all think should be found for the defendant.

The jury were requested by the learned Chief Justice to find specially on the questions submitted, but they found a general verdict. As we cannot clearly see that the jury have by their finding declared that the work, said to have been done the first week in March, was not included in the March estimate, there must be a new trial, unless plaintiffs consent to a verdict for defendant as to the issues on the second breach, and to reduce the verdict by \$128 39½, the amount stated to have been paid for work done the first week in March.

See *London Gas Light Co. v. The Vestry of the Parish of Chelsea*, 36 L. Times, 217; Common Law Procedure Act of 1856; and see 104-5-6 Bullen & Leake's Precedents in pleading at pages 84, 85, and the authorities there referred to.

Per cur.—Rule accordingly.

McGREVY, (DEFENDANT,) APPELLANT, V. RATHBONE ET AL.,
(PLAINTIFFS,) RESPONDENTS.

Demurrage of vessel—Shipping—Transhipment of goods—Responsibility of consignee for.

A. & Co. shipped some stone to B. in Ottawa by vessel, to be transhipped at Prescott and carried by the O & P. Railway Company. A detention of eleven days took place at Prescott through the Railway Company, for which A & Co. brought this action against B., claiming damages for the detention of the vessel. There being no evidence to shew that the consignee undertook more than to receive the stone at Ottawa,

Held, under the circumstances, that he was not responsible for the detention of the vessel.

APPEAL from the County Court of the United Counties of Frontenac, Lennox and Addington.

The declaration alleged an agreement between the plaintiffs and defendant that he (defendant) should receive for

plaintiffs within a reasonable time after notice, certain goods to be delivered to him in a barque at Prescott, and alleged a breach of the agreement to receive the goods from plaintiffs' barque after notice given.

Pleas.—1st. Did not promise.

2nd. No notice of plaintiffs' being ready to deliver.

3rd. Denial of breach.

The following evidence material to the issue was given at the trial :

James Moran, sworn.—I am the master of the barque *Water Witch* ; I recollect taking a cargo of stones in her from Cleveland in Ohio to Prescott in the month of July last ; the bill of lading produced is the one I received from the shippers at Cleveland ; I arrived at Prescott with the cargo on the afternoon of the 9th July, 1860, after 4 o'clock ; I gave notice of the arrival of the vessel to Mr. Pendergrast in the office on the evening of the 9th of July ; the company were not ready to receive the cargo of stones ; I remained at Prescott outside of the railway company's wharf, with the vessel until the 13th of July ; they did not come to unload until after dinner on the 13th July ; the unloading was not completed until the 20th July, at noon ; the unloading went on very slowly ; the stones were taken in rail cars ; they would sometimes come with three cars, other times with four, five, or six cars, and would load them, and then would be off. I think if we had two cranes we could have unloaded the vessel in two days ; we must have lost eight days altogether ; the vessel's tonnage is 289 ; we had five men, two mates, and myself ; I think \$40 a day would be only reasonable compensation for the expenses of the men and the detention of the vessel.

I gave the bill of lading to Mr. Pendergrast, who is clerk in Mr. French's office at Prescott ; I handed it in in the evening after 5 o'clock ; I put my line ashore on the company's wharf the first day before I landed ; I was there four days before I notified Mr. French ; our full crew is ten men ; I had only five men at Prescott and two mates ; It would take three weeks to come from Cleveland to Prescott, and to return to Cleveland ; we had 300 tons of freight upwards ;

it took us 5 or 6 days or a week to load at Cleveland; we hire men by the month; I get \$50 a month; the first mate gets \$25, the second gets \$20, and the men \$16 a-month; I gave every facility for the unloading of the stones; the delay was caused by the company; they sent the cars only once a-day to the vessel; they arrived in the night time, and were loaded in the morning, and then went away until next night; Mr. French told me their men were working at another place; I notified Mr. French in writing that we would make a claim for the detention of the vessel; the freight paid by Mr. Doyle was to the owners of the vessel, and not to me.

Benjamin French sworn.—I am the superintendent of the Ottawa and Prescott Railway at Prescott; I have an office there for the company; Mr. Pendergrast is our freight agent at Prescott in the same office; I received the cargo of stones for the defendant at Prescott from the *Water Witch* in July last; the actual time worked in unloading was four and a half days; the vessel arrived at Prescott on the 9th of July, at 3 o'clock, p.m.; the unloading was not completed until the 20th July; she was detained altogether 11 days; there was one Sunday; I make the time of the detention $6\frac{1}{2}$ days including the Sunday, or excluding the Sunday $5\frac{1}{2}$ days; the delay was not caused by the want of energy or management on the part of the captain and crew on board the vessel; the stones were forwarded to Ottawa immediately from day to day as they were unloaded from the *Water Witch*.

John R. White sworn.—I am secretary of the Ottawa and Prescott Railway Company at Ottawa; I know a lot of stone of the defendants was delivered to him at Ottawa last summer, which were forwarded from Prescott in our cars; they were delivered to him by the company.

There were stones delivered to defendant during the entire season; all the stones which were forwarded from Prescott to Ottawa for Mr. McGrevy were delivered to him by the company.

Edward Berry sworn.—I am agent for the barque *Water Witch*; the plaintiffs own her; she was running on account of the plaintiffs in this action in the month of July last.

I sold the Water Witch to the plaintiffs; she was sold by a conveyance in writing—an ordinary bill of sale; she was sold to them some years ago; I signed the bill of sale of her in Canada. I know the Water Witch was running on account of the plaintiffs last summer in July.

Mr. O'Reilly for the defence objected—1st, that there was no privity between the plaintiffs and the defendant which would make the defendant liable for detention or demurrage to the plaintiffs.

2nd, that there was nothing on the bill of lading to shew that the cargo of the Water Witch was to be delivered at Prescott; on the other hand it shewed that it was to be delivered at Ottawa.

3rd, that the plaintiffs had not proved a proper notice of the arrival of the vessel to the defendant, or any notice whatever.

4th, that no proper evidence of ownership of the vessel by plaintiffs was given, the vessel being a registered vessel, sold by a bill of sale; the papers and proper proof from the registry office should be produced.

5th, that there was no stipulation in the bill of lading for the payment of demurrage, nor evidence of a charter party containing any such stipulation or agreements, without which no demurrage could be legally charged against the defendant.

6th, that the Ottawa and Prescott Railway Company were to be considered as the agents of both parties if ours, consequently the defendant would not be liable to the plaintiffs for compensation or damages, for a detention caused by their mutual agents.

A verdict was taken for the plaintiffs for \$200 damages, subject to the above objections, leave reserved to the defendant to move in term to enter a nonsuit, or a verdict for the defendant on all the objections.

In January term, 1861, *Mr. O'Reilly* obtained a rule *nisi* accordingly.

Judgment of the County Court was pronounced by the judge on the 26th of January, 1861, discharging the rule *nisi* and awarding the *postea* to the plaintiffs.

From which judgment the defendant appealed on the following grounds:

First. That the learned judge was wrong in holding that the contract as laid and set out in the plaintiff's declaration was proved at the trial, as there was nothing in the evidence given at the trial to support such contract.

Second. That the learned judge should have held that no sufficient notice of the vessel's arrival at the port of Prescott had been given to the defendant. The service of the notice upon the railway company not being a service on the defendant.

Third. That the learned judge was wrong in holding that an implied contract had been proved as declared upon, as the defendant could not by implication be held to have made or entered into a contract from the mere fact of his being the owner of the cargo. The bill of lading put in at the trial went to establish the fact that the stones were to be delivered at Ottawa, and the detention of the vessel at Prescott, or any detention in unloading the vessel at Prescott by the railway company could not result in damages which the defendant as owner or consignee of the cargo, could be held liable to pay upon an implied contract to receive the stone at Ottawa.

Fourth. The learned judge was wrong in holding that Thatcher, Burt & Co., were the agents of the defendant at the port of Cleveland. The fact of their having supplied the stone could not constitute them or would not be sufficient to constitute them defendant's agent. There may have been a contract between them and the defendant to deliver the stone to the defendant, at the place designated in the bill of lading. The shippers of the goods simply do not constitute them the agents of the consignees or owners.

Fifth. That the learned judge was wrong in holding that the defendant was liable in damages for the detention of the vessel at the port of Prescott, as there was no privity of contract between the plaintiffs and defendant wherein the duty devolved on the defendant to receive the cargo at the port of Prescott within a reasonable time after the vessel's arrival at Prescott.

Sixth. That the learned judge was wrong in holding that the railway company were the agents of the defendant at

Prescott, or the sole agents of the defendant for receiving said cargo at Prescott. The fact of receiving the stone from them at Ottawa would not constitute them agents at Prescott.

Richards, Q. C. and *O'Reilly* of Kingston for the appellant, cited *Wegener v. Smith*, 15 Com. B. 285; *Smith v. Sieveking*, 4 E. & B. 951, and 5 E. & B. 589; *Young v. Moeller*, 5 E. & B. 755; *Erichsen v. Barkworth*, 3 H. & N. 601, 894.

MacLennan, for respondents, referred to *Coleman v. Lambert*, 5 M. & W. 505; *Chitty on Carriers*, 113, 209, 212, 1314; *Brouncker v. Scott*, 4 Taunt 1; *Horn v. Bensusan*, 9 C. & P. 710; *Kell v. Anderson*, 10 M. & W. 499; *Brown v. Ross*, 5 U. C. Q. B. 469.

HAGARTY, J.—No evidence appears on the appeal book explaining the relation of the shippers, Thatcher, Burt & Co., to the defendant. All that the evidence or bill of lading shews is that certain stone was shipped in Cleveland in the plaintiffs' vessel and consigned to defendant at Ottawa, care of the Ottawa & Prescott Railway Company, Prescott, subject to freight and charges.

Can I assume on this that the shippers were defendant's agents to ship, or were they selling stone to him, as they might any other resident of Canada?

Is there anything in the evidence to imply any contract whatever by defendant, except that on receipt of the goods he will pay freight and charges, and this is only evidenced by the assumption that he did so receive the stone. Did he by such receipt imply any contract, for instance, that a railway company over whose line the stone must apparently pass to reach him, should not delay over a reasonable time in taking it from the vessel?

For all that appears on the case, defendant may have contracted with the shippers, Thatcher, Burt & Co., to buy stone from them, deliverable in Ottawa, for which he would pay freight and charges. I cannot see from the case how or where freight was paid. The only mention of it is in the

master's evidence. "The freight paid by Mr. Doyle was to the owners of the vessel and not to me." It is not stated who Mr. Doyle was. It seems clear that this action cannot be sustained for demurrage as such, but only as some contract express or implied to receive cargo at Prescott within a reasonable time.

If on the evidence before us the defendant becomes answerable for any delay caused by an independant railway company on the line of transit, even assuming that he authorised the Cleveland shippers to ship the goods, the consequences might be very startling. I cannot distinguish the case from that of a Toronto merchant buying goods in Liverpool, to be sent by the Canadian steamers and Grand Trunk Railway to Toronto. Does he thereby impliedly undertake that the railway company will, without reasonable delay, unload the goods, or receive them from the steamer in Montreal, and can the steamboat owners sue him for damages for the detention of the vessel on such a pretext?

Further, can I gather from this case that there is an established custom at Prescott for the railway company to attend with cranes and hoisting tackle, and a sufficient number of hands to unload stone from vessels. Did the defendant undertake he would do so? Could the plaintiffs have left the vessel at Prescott for three or six months, or any indefinite time, at defendant's cost, if the company failed so to unload?

If we imply an undertaking by defendant to be in any way answerable for the transshipment of the goods at Prescott, can it be extended beyond an agreement that it shall be done in the usual and customary time at the port of discharge, as in *Rodgers v. Forrester*, 2 Camp. 484, or *Burmesster v. Hodgson*, 2 Camp. 488. If there had been a great press of business at Prescott—many vessels to be unloaded—would defendant still be answerable for a detention till the turn of his vessel arrived. The evidence here is very indistinct as to the true cause of the delay in unloading by the company's men.

Nothing appears in the evidence from which I can infer that the defendant was to be at the expense of unloading the

cargo at Prescott, or that the plaintiffs had not the duty on them of delivery to the railway company.

Practically, I dare say that bulky articles like stone are transferred by the company directly from the vessel to the cars. In the absence of any evidence of established custom, I do not see my way to burden the defendant with any such liability. In ordinary cases, on a ship's arrival, consignee may require the goods over the ship's side, or if he be not in attendance, the master may land them at the accustomed landing place or warehouse, where they lie subject to freight and charges.

Buller, J., says in *Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 397, "A ship trading from one port to another has not the means of carrying the goods on land; and, according to an established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier."

Assuming that there is evidence that defendant received this stone under this bill of lading from the railway company at Ottawa, I can see no liability on his part to answer for the alleged delay of the company at Prescott.

I think it would introduce the most mischievous consequences into mercantile transactions to uphold such a claim as this. If these plaintiffs recover on this evidence, we must hold every Upper Canadian merchant who orders goods from England or New York, responsible for delays in all the various railway companies and steamboat lines which compose a long broken line of transit. I believe such a doctrine is as untenable in law as it would be inconvenient in practice.

The learned judge below assumes throughout that the Cleveland shippers were the defendant's agents, hiring a vessel for him, and by his directions making this particular contract with plaintiffs. This may have been so in fact, but I cannot gather it in any way from the evidence, and I know nothing of the facts except from the appeal book. He also considers that the defendant impliedly promised to receive the goods in a reasonable time after notice of the vessel's arrival at her destined port, and that by the bill of lading they were to be delivered in good order to defendant's

agent at Prescott. It may be that this instrument at least as strongly bound the carriers to a delivery to the defendant at Ottawa over the railroad which formed part of the whole route.

In Smith's Mercantile Law 315, 6th ed., it is laid down: "The manner of delivering up goods, and consequently the period at which the master ceases to be responsible for them, depends, in the absence of agreement, on the custom of the place. In the absence of any custom the consignee's right has been decided to be to have reasonable time and opportunity for coming and receiving them from the ship's side." If the consignee send a lighter for the goods the master must by the custom of the river Thames watch them in the lighter till it is fully laden, but not afterwards.

In the case of a transferable bill of lading, if it be not produced, the master after waiting a reasonable time may deliver the goods to a third person to keep till it is produced.

I think the evidence before us discloses no liability on the defendant as alleged, and that the appeal must be allowed and a nonsuit entered in the court below.

The plaintiffs may desire in another action to prove facts that may possibly alter the legal position of the parties.

Per cur.—Appeal allowed.

BLEVINS V. MADDEN.

Garnishee—Judgment recovered—Attachment of smaller sum—How far satisfaction of greater—Pleading.

The plaintiff declared on a mortgage for £309. Plea thereto *non est factum*.

Second count on a judgment in the Queen's Bench for £78 12s. 11d.

Third count on a judgment in this court for £128 18s. 5d. To both last counts the defendant pleaded on equitable grounds, that the judgments were obtained on confessions taken by plaintiffs from defendant, while he (plaintiff) was his attorney by fraud, covin and misrepresentation, and that they were given without consideration, and by undue influence, and after setting out two judgments amounting in all to £99 17s. 8d., recovered against the plaintiff, and attachments, and *fi. fa.* lands issued thereon against the defendant, and alleging said judgments to be in full force and unsatisfied, alleged that the indebtedness as in the first and second counts alleged (if any) due to the plaintiff have been attached to satisfy the other judgments.

On demurrer held bad, 1st, because it was pleaded in bar of the plaintiff's whole cause of action on the second and third counts, whereas it only shewed a partial answer if good as to that.

2nd. That it did not shew any order requiring the garnishee to pay the judgment creditor.

3rd. That the proceeding taken upon the judgment did not amount to a satisfaction, because, for all that appears on the pleas, the plaintiff in the attachment may issue execution and obtain satisfaction against the present plaintiff during the currency of the *fi. fa.* against lands.

DEBT.—The first count was on a mortgage for £309; to which the defendant pleaded *non est factum*.

The second count was on a judgment recovered in the Court of Queen's Bench for £78 12s. 11d., and the third count on a judgment recovered in this court for £128 18s. 5d. To which two counts the defendant pleaded on equitable grounds, that the judgments were recovered by plaintiff upon two confessions obtained by plaintiff from defendant by fraud, covin, and misrepresentation of plaintiff, who in obtaining them was acting attorney for defendant, and defendant being ignorant of the nature of the confessions; that the confessions were given without consideration, and by undue influence and fraud of plaintiff, and "claiming all rights on that behalf to avoid and set aside the judgments entered on those confessions," defendant says, that on the 29th of June, 1858, and before the commencement of this suit, one Coote recovered a judgment against the plaintiff and one Lee, in the County Court of Oxford for £43 7s. 2d. That on the 27th of July, 1859, Coote obtained from the judge of the County Court an order that all debts due or

owing or accruing due to the plaintiff from the defendant should be attached to satisfy the said judgment; and on the 30th of August, 1859, a writ of execution was duly issued out of the County Court in favour of Coote to levy the said moneys with costs, &c., of the lands and tenements of the defendant, which writ was delivered to the sheriff of Oxford to be executed, and the sheriff took in execution certain lands of defendant, more than sufficient to satisfy the moneys, &c., recovered by Coote against the defendant, and which order and execution are still in force.

That on the 31st of May, 1859, and before the commencement of this suit, one McIntyre recovered a judgment against the plaintiff in the County Court of Oxford for £56 10s. 6d., and pleaded an order of the county judge, and an execution against defendant's lands, in precisely the same form as with regard to Coote's judgment recovered against plaintiff.

That the order and proceedings were made by the county judge, and within his jurisdiction; that before and at the time when the same were made all the parties aforesaid were within the jurisdiction of the County Court; that none of the said proceedings were carried on against any of the parties as absconding debtors; that the orders were served and due notice was given to defendant; that neither the judgment recovered by Coote, nor that by McIntyre, or any part thereof have been paid. And defendant protesting as aforesaid against any indebtedness on either judgment in the first and second counts mentioned, says, that the debts (if any) due to plaintiff in respect thereof have been attached in the hands of the defendant, to satisfy the other judgments, costs, sheriff's fees, &c.

Issue on the first plea.

Demurrer to the second on the following grounds:

1st. *Non constat*, that Coote or McIntyre were creditors of plaintiff, or that their judgments were recovered by them as creditors of plaintiff, within the meaning of the act.

2nd. That it is not shewn that the judgments against defendant were attachable; they may have been merely for costs.

3rd. That defendant sets up a liability for a much smaller amount as a bar to plaintiff's recovering his judgments which are greater.

4th. Defendant sets up a seizure by sheriff of defendant's property as a satisfaction of plaintiff's judgments.

5th. That if Coote's or McIntyre's judgments were to be first paid, they would not satisfy plaintiff's two judgments.

6th. That it does not appear but that plaintiff may have paid some part of Coote's or McIntyre's judgments.

7th. That the plea professes to answer the 2nd and 3rd counts, and only answers part.

8th. That the matters contained in the plea would not entitle the defendant to an absolute unconditional injunction.

The issue was brought to trial at the Toronto January assizes, 1861, before *Burns, J.* The plaintiff proved a power of attorney, dated the 14th of November, 1856, from defendant to one William Heger Landon, and he also proved the mortgage declared upon in the first count to have been executed by W. H. Landon as attorney for and in the name of defendant. No one appeared for the defendant. The jury found for plaintiff on the first count with £355 7s. damages. And assessed damages on the second count at £96 6s. 11d., and on the 3rd count at £149 4s. 5d.

In Hilary Term *D. G. Miller* obtained a rule *nisi*, to set aside the verdict on affidavit, explaining how the cause was undefended at *nisi prius*, and on the law and evidence, as to the first count, contending that upon the proper construction of the power of attorney, Landon had no authority to execute the mortgage.

The rule *nisi* was returnable at the time the demurrer came on for argument, and *Blevins* shewed cause and supported the demurrer. It was agreed by him that the defendant might take any objection to the verdict, which he could have raised if a defence had been made at *nisi prius*, and therefore nothing turned on the affidavits. He cited *Tilbury v. Brown*, 6 Jur. N. S. 1151.

D. G. Miller, contra, cited *Brook v. Smith*, Salk. 280; *Savage's case*, Salk. 291; *Webb v. Hurrell*, 4 C. B. 287;

Lockwood v. Nash, 18 C. B. 536; Hirsch v. Coates, 18 C. B. 757; Turner v. Jones, 1 H. & N. 878.

DRAPER, C. J.—I think the plea shews no defence on equitable grounds. If it is not good at law it is not good at all. And at law it appears to me bad, because it is pleaded in bar of the plaintiff's whole cause of action on the second and third counts, whereas it shews only a partial answer, admitting it to be good as to part. The plaintiff's claim is upon two judgments amounting together to £207 11s. 4d., while the plea sets up two attaching orders for only £99 17s. 8d., and cannot afford an answer to more than that sum with interest.

I am disposed to think the plea is bad on another ground. It does not shew any order requiring the garnishee to pay the judgment creditor, and though it is averred there is an execution in the sheriff's hands against the lands of the defendant as garnishee, it is not shewn that such execution is founded upon a proper authority. It does not necessarily follow from the fact that the execution has issued. There may have been some consent of the garnishee founded on an understanding between him and the judgment creditors. In *Turner v. Jones*, 1 H. & N. 878; *Bramwell*, B., seems to consider an order to pay as indispensable for the protection of the garnishee.

Besides, this plea sets up as a bar, that the plaintiff was himself indebted to other parties, who have obtained an order to attach debts due to the plaintiff, and have issued execution against defendant's lands to recover so much of what he owes the plaintiff as will satisfy the plaintiff's several debts to them. If the facts shewn discharged the plaintiff from liability to his own creditors, there might be some reason for sustaining the plea, at least to the extent of that satisfaction; but such is not the case. Those creditors may take out execution and levy on any property the plaintiff might acquire before the defendant's lands could be sold. Even if the defendant obtained judgment on this plea it would leave plaintiff still liable to his own creditors, as well as prevent his recovering any sum which defendant might

owe him beyond what the attaching creditors could claim. Before actual payment by or execution levied on the property of the defendant, he ought not, I think, to be heard to set up such a defence in which I can perceive neither law nor equity.

As to the application for a new trial, that strictly speaking applies only to the first count, on which there is an issue. For there is no application to set aside the assessment of damages on the 2nd and 3rd counts, and I do not see that the plaintiff need go down to another assessment, though he may be unable to enter any judgment so long as the issue in fact remains on the record undisposed of.

I remain of the same opinion that I had during the argument, namely, that the power of attorney does not in any part indicate an intention on the part of the defendant to enable Mr. Landon to borrow money on the mortgage of this land, or even to give a mortgage to secure any pre-existing debt, and the frame of the mortgage is not consistent with this latter idea, for it purports to be made in consideration of £309 paid, and the receipt thereof acknowledged. No explanatory evidence was given, if any could have been given, which would have helped the plaintiff's case.

I feel called upon to notice a most unnecessary introduction of useless and redundant matter in the plea. I am at a loss to conceive any motive for it, and had our judgment been in favour of the plea, I should have thought it proper to consider whether all this useless matter should not be struck out with costs to be paid by defendant. It has not failed also to strike me that the second and third counts are founded on judgments recently recovered. The plaintiff, however, cannot get costs on these counts without the order of court or judge.

In my opinion the rule should be made absolute for a new trial of the issue, without costs, and the plaintiff should have judgment on the demurrer.

Per cur.—Rule absolute, and judgment for plaintiff on demurrer.

SMITH V. THE CORPORATION OF THE CITY OF TORONTO.

By-law—Tavern license—Action for breach of—Forfeiture.

Action for illegally depriving plaintiff of his tavern license.

The defendants pleaded, that plaintiff carried on business under a by-law, the provisions of which he had infringed, and thereby his license became forfeited. Demurrer, that defendant had no power to pass such a by-law.

Held, that no action can be brought for the infringement of a by-law till one month after it has been quashed.

WRIT issued the 6th of September, 1860.

1st count of declaration stated that defendants wrongfully deprived plaintiff of his tavern license.

2nd. That defendants assaulted and imprisoned plaintiff, &c.

To which defendants pleaded: that plaintiff carried on his business as an in-keeper under license from defendants, under by-law No. 5, passed on the 15th of February, 1859, and by said license plaintiff was bound to obey and fulfil the provisions of said by-law No. 5, one of which was that no intoxicating liquors should be sold on Sundays, and another that on conviction of breach of aforesaid condition, that in addition to the penalty thereby imposed, the party so convicted should absolutely forfeit his license; that during the continuance of said license, and while plaintiff kept such inn under it, he, the plaintiff, was convicted of a breach of the said by-law No. 5, and fined in the sum of \$40, and did thereby forfeit his said license under said by-law, which is the deprivation alleged in the first count of the declaration. To which plea plaintiff demurred on the grounds that defendants had no power according to law to pass such by-law, or to deprive plaintiff of his license for the alleged offence. Joinder in demurrer.

Hallinan, for plaintiff, referred to Consol. Stat. U. C., ch. 126, secs. 1, 9, 16, 20, p. 991; *Whitfield v. S. E. Ry. Co.*, 4 Jur. N. S. 688, Q. B.; 27 Law J. Q. B. 229.

Adam Wilson, Q. C., for defendants, referred to Con. Stat. U. C., ch. 54, sec. 254, Et. Seq.

DRAPER, C. J.—No exception has been taken to this declaration. The only question raised before us is, whether the plea justifying what is complained of is sufficient, in

other words, whether the defendants had legal authority to pass the by-law set out in the plea.

But there is no averment by plaintiff in reply to the plea that the by-law has been quashed, and conceded for the argument's sake that it was *ultra vires*, still by sec. 202, no action can be brought until one month after the by-law, "illegal in whole or in part," has been quashed.

If the by-law is legal, it does not authorize the defendants to deprive the plaintiff of his license, but it absolutely forfeits the license by its own inherent force, on certain facts being established. This forfeiture is the thing complained of in the declaration, for that is the only meaning I can place on it. The necessary facts are averred, and the plaintiff admits them.

If the by-law is illegal, but not quashed, the action would not be maintainable under the 202nd section above referred to. The plea, it is true, does not aver that the by-law was in force when the defendants did the act complained of, but sets up that the plaintiff got his license under a certain by-law, and by his license bound himself to obey the provisions of that by-law, and shews that it absolutely forfeits the license under certain circumstances. So that either way the demurrer fails.

Mr. *Hallinan*, in support of the demurrer, referred to the Consol. Stats. U. C., ch. 126. The defendants are the corporation of the city of Toronto, which corporation is not a justice of the peace, nor an officer, nor a person fulfilling a public duty arising out of the common law, or imposed by act of parliament so far as the subject matter stated in the declaration is concerned. And it does not appear to me that the 12 sec. of Consol. Stats. U. C., ch. 2, which enacts that the word "person" shall include any body corporate or politic, or party, "*to whom the context applies*," affects this question, for I think the whole frame of ch. 126, excludes its application to the case of a corporation.

Per cur.—Judgment for defendant.

COCHRANE V. McDONALD.

Agreement for sale of land—"Peaceable possession to be had" not a continuing contract—Crown sale—Evidence required to shew sale cancelled.

Plaintiff purchased from defendant two lots of land, taking the following receipt for the money paid :

Received, Goderich, 16th June, 1857, from A. C., in promissory notes and otherwise, the sum of £200cy. for transfer of lots 11 & 12, in the 8th concession of the Township of Turnberry, to be procured from the original locatee in or before one month from this date, and peaceable possession to be had of the land, or the consideration of transfer to be returned.

R. had purchased from the Crown in 1854. He assigned to defendant, and defendant to the plaintiff, who went into possession, but one F. immediately claimed one of the lots, and forbade him from working on it, whereupon the plaintiff desisted. The plaintiff soon afterwards, with defendant's consent, arranged verbally with one M. to assume his bargain, and M. went into possession in January, 1858, and remained until October, 1859, paying three instalments to the Crown in plaintiff's name. It was shewn that in November, 1854, two months after the date of R's purchase, a receipt was given by the Crown to H. for this lot, treating him as the purchaser, and it appeared at the trial, but by verbal evidence only, that in April, 1859, the Commissioner of Crown Lands decided in favor of H., and that he should pay M. for his improvements, which he had done. M. in consequence gave up possession, and the plaintiff then sued defendant as for a breach of the agreement for quiet possession.

Held, that he could not recover, for, 1st, the contract was not a continuing one, but was satisfied when the plaintiff obtained peaceable possession ; 2nd. when H. warned off the plaintiff he had himself no right ; and 3rd, there was no sufficient evidence that the sale to R. had been effectually avoided.

The declaration alleged that defendant on the 16th day of June, 1857, in consideration of £200, by agreement in writing agreed to sell and transfer to plaintiff, who agreed to buy from defendant lots 11 and 12, in the 8th concession of Turnberry, and further promised and agreed that plaintiff should have peaceable possession—an averment of payment of £200—but that plaintiff never had peaceable possession, but on the contrary had been deprived of the possession.

Common counts.

Pleas 1st. Non-assumpsit to first count.

2nd. Plaintiff had peaceable possession.

3rd. That the plaintiff was deprived of possession by his own default.

4th. That the plaintiff was not deprived of possession.

5th. To the second count—never indebted.

Replication 1st. Joined issue on all the pleas.

2nd. Demurrer to third plea.

The cause was tried before *Richards, J.*, at the spring assizes, 1860, and a verdict rendered for the plaintiff, damages

£235, subject to the opinion of the court on the evidence given at the trial as below.

The following is a copy of the receipt put in at the trial and admitted :

Received, Goderich, 16th June, 1857, from Mr. Andrew Cochrane, in promissory notes and otherwise, the sum of £200cy. for transfer of lots 11 & 12, in the 8th concession of the Township of Turnberry, to be procured from the original locatee in or before one month from this date, and peaceable possession to be had of the land, or consideration of the transfer to be returned.

(Signed)

J. MACDONALD.

The evidence material to the decision is as follows:

John Gemmill sworn.—Plaintiff did not get the lot because the government cancelled it in favor of Mr. Hastings. The government sale to Redford was cancelled in favor of Mr. Hastings; Redford conveyed to defendant; there was a conveyance to plaintiff from defendant; plaintiff went on about the line between 11 and 12, and underbrushed about a day; Robert Hastings claimed that the lot was his as he told me; it was four or five days after the purchase; the receipt and assignment to plaintiff are in the Crown Land office; they were left in the Crown Land office in Toronto. I told defendant that plaintiff was frightened; I told him I thought I could get another; then George Muir came on; plaintiff sold to him; he took his bargain; Muir never could get peaceable possession; I mean he never could get paying the taxes; he went on the lots on the 15th January, 1858, and remained there till October or November last. On the 9th April the government cancelled No. 11 in favor of Mr. Hastings; Mr. Vankoughnet said Mr. Hastings was to get the lot; Muir was to be paid for his improvements; Hastings paid Muir for the improvements on No. 11, and Muir gave it up to him. There is no decision by the government as to lot 12, but plaintiff don't want it; Redford's receipt of the 12th of September, 1854; it is said Hastings's receipt was since; I never saw it; Muir did every thing possible to get the lot, but could not; Muir paid three more instalments to the government in the name of Cochrane; the letter produced is signed by defendant; on getting it I went to the

commissioner in Toronto and represented every thing in favor of Muir, but Mr. Vankoughnet said he would not alter the decision; it was all paid to Cochrane and I paid it to him myself for Muir.

Charles Widder sworn.—I am Crown Land Agent at Goderich; I know the claim to lot 11 was cancelled in favor of Hastings; the sale to Redford was cancelled; the transfer from Redford to defendant and plaintiff appeared regular according to my copy; Redford's was dated 12th September and Hastings' 12th November; I was in error as to its date in my report, and Messrs. Hamilton and Gowan made the same error; I know Hastings had not made large improvements on the lot; no record in the clerk's books of sale to Hastings.

John Hastings sworn.—I got lot 11; I then resided on the adjoining lot; when Cochrane went first I went there and forbid him, and told him it was mine; he went away that night; Muir came in his place; I forbid him the same way; he came on with a force of men, put up a house, and never left till the commissioners decided in my favour.

Cross-examined.—I attended the sale to buy the land; I was told by Mr. Clark on 6th September it was sold; on the first day of the sale I had sent the money by another man and he told me the same. Mr. Clark then told me I must make affidavit of my claim; I did so, and he told me he would send me word when the sale would be cancelled; he did so, and I came down and paid him the money for lot 11, and got a receipt for 11; he refused to take the money for the other; he gave me a receipt for the money for lot 11; he told me his instructions were to limit a squatter to 100 acres; I intended to purchase lot 11 in the 9th and lot 11 in the 8th concession. I settled on lot 11 in the 9th concession; I considered I was entitled to 200 acres; a year before the sale I took possession of both lots, and I had only a brush heap on it before the sale; I in fact applied to purchase these lots twice before this was actually sold.

(Mr. Becher objected that the agreement was only for peaceable possession to himself, which he got, and his vendee also got possession and remained two years in possession; that the plaintiff had no beneficial interest in the agreement or land, he sold out and got all he paid for it.)

John Gemmill recalled.—The money and notes were mine; I was lending it to Cochrane to pay for the land; when Cochrane left he was to pay me as he could; when Muir came up I made the bargain with him that he was to take Cochrane's bargain; he was willing to take it on the same terms Cochrane had it; he went into possession about this time; I had seen Mr. McDonald, and told him about Cochrane, and he proposed to get a new transfer to Muir, but that was never done; he sent a power of attorney to authorise me to sue on the agreement; he gave me the power of attorney produced.

Cross-examined.—Muir paid Cochrane no money at all; Muir just stepped in; I never took Cochrane's note or security for it; I told Muir how it was and if he would take Cochrane's place; Muir never got a transfer from Cochrane; I don't believe I gave Redford's assignment to Cochrane to Muir; Muir was my brother-in-law, and I wrote to Lanark to have him come up; Muir had no writing that I know of nor was there any writing between them about it; nothing was said to Cochrane to shew he was clear of the land; it was my money—my notes; there was a verbal contract on the part of McDonald to get a transfer to Muir, but it was never carried out; Muir has no claim that I know of on sheriff McDonald; I know at one time that he wrote to the sheriff claiming damages; I wrote to Cochrane stating what was to be done; I employed the lawyer; the suit is to recover £200; Muir never paid Cochrane any thing, money, promissory notes, or any thing for the transfer as I know.

Upon this evidence a verdict was rendered for plaintiff; damages £235, subject to the opinion of the court, who were to draw conclusions as to facts, and reduce the verdict if plaintiff was not entitled to the full amount.

Richards, Q. C., for plaintiff.

C. Robinson for defendant cited Rawle on Covenants, 185; Platt on Covenants, 113; Doe Henderson v. Seymour, 9 U. C. Q. B., 47; Mayne on Damages 100.

DRAPER, C. J.—The only breach of contract for which the plaintiff seeks to recover is of that part contained in these words, "and peaceable possession to be had of the land."

It appears that a Crown sale of the lots mentioned, Nos. 11 & 12, in the 8th concession of the township of Turnberry, had been made to one Redford on the 12th of September, 1854, and a receipt for the first instalment of the purchase money was given to him. Redford assigned his interest in the purchase to the defendant, and the defendant in turn made an assignment to the plaintiff, obviously in accordance with the terms of the receipt sued upon. These papers were transmitted to the commissioner of Crown lands in order that the assignment might be registered. Plaintiff went into possession immediately, and began to work, but on the day he entered, or very soon after, one Robert Hastings stated that he claimed lot No. 11, and forbid plaintiff doing any thing on it. Plaintiff thereupon desisted. All this happened apparently in June, 1857. Soon after the plaintiff made a verbal arrangement, to which it seems the defendant was an assenting party, that one Muir should take plaintiff's place, should take his bargain; and Muir went into possession on the 15th January, 1858, and remained there until October or November, 1859, during which time he built a house thereon. John Hastings stated that he claimed No. 11, and forbade Muir taking possession of that lot. Muir endeavoured either to be recognized by the Commissioner of Crown lands or to get the title, and paid three instalments in the name of Cochrane to the commissioner or his agent, in pursuance of the terms of the sale to Redford.

It further appeared that a receipt dated in November, 1854, was given by the agent of the Commissioner of Crown lands to Hastings, treating him as the purchaser of lot No. 11; and on the 9th of April, 1859, according to the testimony of one witness, the commissioner of Crown lands decided in favor of Hastings, and rescinded the sale to Redford of lot No. 11, leaving lot No. 12 as it was before. There were no official documents or correspondence put in, shewing how or why the sale to Redford was rescinded, but in consequence of the alleged determination of the question Muir gave up the possession. The decision was stated to be that Muir should be paid for his improvements, and Hastings has accordingly paid him. It might be inferred from

the proof that plaintiff paid three instalments of the purchase money in the name of Cochrane that the latter had been recognised in the office of the commissioner of crown lands, as assignee of Redford the first purchaser, but it was not distinctly proved, nor was there any direct proof of any regular proceeding warranted by the statute regulating the sale of public lands to cancel the sale to Redford, nor in fact that there was any sufficient reason why it should be cancelled. I do not perceive in the evidence any thing to prevent Redford or his assignee, if he had obtained a license of occupation under 16 Vic., ch. 159, sec. 6, from enforcing a right to the possession.

Looking at the words particularly in question, "and peaceable possession to be had of the land," at the subject matter of the purchase and sale, and at the circumstances attending it, what was the undertaking of the defendant? Knowing this, it will be easy to say whether it has been broken.

Let it be assumed for the sake of argument that the Crown had recognised the plaintiff as the assignee of Redford, the original purchaser, and that the plaintiff had entered and obtained possession of the land without hindrance or obstruction, would the agreement contained in the words above set forth have been fulfilled? It appears to me that it would. This was never meant as a continuing contract for quiet enjoyment, for it was the intention of the parties that the nature of the title transferred should be changed and merged in a grant from the Crown. Nor do I think it a reasonable construction to treat this as an agreement for quiet enjoyment at all, for the plaintiff himself had payments to make to entitle him to retain possession until he got a patent. The defendant only engaged to procure a transfer from the original locatee, and that peaceable possession should be had. He did procure a transfer from Redford, who is shewn by the evidence to have been the original locatee or vendee, and he obtained, as appears to me, peaceable possession, for he entered without obstruction, and though warned and forbidden as if he were a trespasser by Hastings, yet it appears that at that time Hastings had no right: that the only right as a purchaser was then vested in the plaintiff

himself, and that such right, if ever legally divested at all, was not so divested until Muir, who entered as representing the plaintiff, had been in possession about eighteen months.

Then I think the evidence that there has been any breach of the contract, even if it is to be construed as more than a contract, that the plaintiff shall be enabled to enter and obtain peaceful possession of the land, is very inconclusive. Mr. Widder certainly does say the sale to Redford is cancelled, but it is obvious he has no personal knowledge of the fact; and Gemmill swears that the fact is so, repeating a conversation with the commissioner of Crown lands. But to avoid the sale which was made to Redford, as the receipt to him shows, and to annul and destroy the incipient right thereby created, seems to me to require something more than a verbal declaration of the commissioner of Crown lands. Such a proceeding cannot be assumed to have taken place without giving parties interested an opportunity of being heard, and without a formal decision, of which there is no proof. Nor do I think that Muir by quitting the possession and allowing Hastings to get it, on paying him (Muir) for his improvements, can give the plaintiff a right to maintain this action against the defendant as proving a breach of defendant's agreement that peaceable possession of the land should be had.

For these reasons I think the defendant entitled to the *postea*.

Per cur.—*Postea* to defendant.

STEVENSON V. McLEAN.

Surety—Guaranty—Action on.

A. agrees to become surety to B. for all such advances as B. may make to C. during a limited period. B. makes no individual advances to C. at all, but during the period B. with D. a stranger to A. make advances to C.

Held, that B. individually cannot recover from A. the amount of the advances so made.

SPECIAL CASE.

This action was brought upon a written guaranty signed by the defendant which was in the words and figures following:

Toronto, December, 24th, 1858.

MICHAEL STEVENSON, Esq., Quebec.

SIR,—Understanding from my son Mr. T. A. McLean, that he has made an arrangement with you for certain advances to be made to him in the course of his business from this time till next autumn, and that you require a guaranty that he shall deliver to you during the next season of navigation staves or timber sufficient to cover the amount of such advances, I hereby undertake that the said T. A. McLean shall deliver to you at Quebec, such quantity of timber or staves as shall amount in value to a sum equal to the advances made to him not exceeding a sum of three thousand pounds.

I am Sir, your Obedient Servant,

A. McLEAN.

The facts of the case were as follows:

Previous to giving of the above guaranty, which was obtained by Mr. T. A. McLean, from the defendant in Toronto, an agreement had been entered into without the knowledge of the defendant, and of which he had no notice, in the words and figures following:

Memorandum of agreement between Messrs. H. J. Noad & Co., Thomas A. McLean of Orford, C. W., and M. Stevenson & Co. Messrs. H. J. Noad & Co., and M. Stevenson & Co., agree to advance Mr. McLean to the amount of twelve thousand dollars for the purpose of getting out oak timber and staves during the present winter, say to the extent to cover all advances including freight, commission, &c., to be forwarded and consigned to them as soon as possible on the opening of the navigation, the commission to be allowed thereon to be five per cent. on the sales of the lumber, and one per cent. brokerage, with interest, as usual, at the rate of six per cent. per annum, and for the purpose of securing the said advances, Mr. McLean agrees to transfer to M. Stevenson & Co., a quantity of staves now on hand at Woodfield harbour, say about thirty thousand merchantable standard and ten thousand merchantable West India staves or the proceeds of the sales of such staves next spring, the same being at present in the hands of Messrs. Regan; also a quantity of cull-standard staves, now in Montreal, and a further quantity on the shores of Lake Erie, the latter to be marked and culled by Malone during the winter; and further, Mr. McLean agrees to furnish a letter

of guaranty from his father that he will fully carry out this agreement.

T. A. McLEAN,
H. J. NOAD & Co.,
M. STEVENSON & Co.

Quebec, 3rd December, 1858.

The guaranty given by defendant in ignorance of the above agreement, and of the parties executing it other than M. Stevenson was sent to Quebec by Mr. T. A. McLean, as the guaranty to be furnished under the above agreement, and no other guaranty was required, but the defendant was not aware that it was intended to be used for any purpose, but to secure the amount of advances which should be made by M. Stevenson & Co. to T. A. McLean.

M. Stevenson the plaintiff conducts his business under the firm of M. Stevenson & Co., and the firm of Noad & Co. consists of Noad and Jeffrey, but these firms have no connexion, and are not partners in business. Advances were made on the joint account of the plaintiff and Noad & Co. to T. A. McLean, to the amount of twelve thousand dollars, M. Stevenson & Co. accepting his drafts drawn at Toronto through the Quebec Bank for that amount at six months, he paying the discount.

M. Stevenson & Co. received in pursuance of the terms of the agreement lumber and staves of T. A. McLean at Quebec during the season of navigation in 1859, and sold the same, charging a commission on the sales, and the proceeds, after deducting such commission and charges, have been applied so far in payment of the advances made by plaintiff, and Noad & Co. being credited as on a joint account. A balance remaining due, the plaintiff and Noad & Co. have sued and have recovered judgment against T. A. McLean, for the full amount which is still unpaid, and they now claim to recover from the defendant on his guaranty in the name of the plaintiff, the balance of such account; the season of navigation mentioned in the guaranty was closed before this action was commenced.

The defendant objected that he was only liable on his guaranty for any amount advanced by M. Stevenson solely and

actually received by T. A. McLean, and not on the joint account, and that he was entitled to have deducted from such amount, the value of all lumber and staves received by M. Stevenson at Quebec during the season of 1859. The plaintiff contended he could recover for all the joint advances.

The questions submitted for the consideration of the court were—1st, can the plaintiff recover for the joint advances on the guaranty of the defendant? If so, can he recover for the whole joint advances, or any part thereof, or is he limited to his own proportion of them? 2nd, if the latter amount only can be recovered, can the defendant claim credit for all the proceeds of lumber received at Quebec during the season of 1859 by M. Stevenson, or only for a proportion, and if so, then what portion thereof?

The case was argued by *Connor*, Q. C., for plaintiff, and *McMichael*, for defendant, citing *Wright v. Russel*, 2 W. Bl. 934, *University of Cambridge v. Baldwin*, 5 M. & W. 580; *Shaw v. Vandusen* 5 U. C. Q. B. 353.

DRAPER, C. J.—I cannot say that I felt any doubt during the argument that upon the facts as stated, the answer to the first question must be in the negative, and it appeared to me the learned counsel for the plaintiff felt that he could not sustain a contrary conclusion.

The case may be thus stated: A. agrees to become surety to B. for all such advances as B. may make to C. during a limited period. B. makes no individual advances to C. at all, but during the limited period B. & D., a stranger to A., make advances to C. Can B. recover from A. the amount of those advances? The answer must be against the right, for it is changing the agreement into which A. entered.

From some explanations of the manner in which the business was carried on and the advances obtained by the defendant's son, it occurred to us that there might be much ground for contending as a matter of fact, that the advances were really made by the present plaintiff, or at least might properly be so treated, and that Noad & Co. were not directly parties to the making of them, though assisting the

plaintiff to make them. But if this be so, in fact, it is not so stated as part of the case on which we are called upon to give judgment, and I have no doubt whatever, that upon the guaranty before us the plaintiff cannot recover from defendant, the amount of advances made by him jointly with Noad & Co. to the defendant's son.

The defendant is liable only to the plaintiff for advances made by him, not by him and another jointly. In effect, when we decided that the now plaintiff and Noad & Co. could not maintain a joint action on the guaranty, we decided that the defendant was no party to, or surety for, dealings between his son and the plaintiff, and Noad & Co. The present case discloses no other dealings—none to which the guaranty is applicable.

In this view the second question does not arise. If all the advances were as the case states, *joint*—to which the guaranty does not extend, the defendant has no interest in the application of the proceeds of staves, &c., delivered by Mr. T. A. McLean to the plaintiff.

The case affords no ground upon which we can sever any part of the advances and treat such part as made by the plaintiff alone, and therefore as secured by the guaranty. The plaintiff, I have no doubt, thought and believed he was procuring the defendant's guaranty for the fulfilment of the agreement made by Mr. Thos. McLean, with himself and Noad & Co., but the case admits that the defendant was not apprised of this agreement, and it does not appear the defendant had any knowledge of Noad & Co., in the transaction. A slight difference in the phraseology of the defendant's agreement would have made it what the plaintiff has, I have no doubt in perfect good faith, always supposed it to be. But the defendant has a legal right to say, "*non hæc in fœdera veni.*" And the court can only construe his agreement according to the language in which it is expressed.

Upon the argument, I rather gathered from the statements of the plaintiff's counsel that Mr. Thomas McLean had got all the advances which he received by and through the medium of drafts drawn upon the plaintiffs alone, and that the plaintiffs may, in the first instance, have honoured these

drafts out of their own funds exclusively, though upon an understanding with Noad & Co., as to being reimbursed in some stated proportion. Whether the fact be so, and whether its introduction into the case would vary the position of the parties, I am not able to say. If the court were satisfied that an important matter has been overlooked which would affect their decision upon the question submitted, an amendment would be an act of justice which neither party should object to. Or if there are grounds for doubting how the fact is, an issue in the cause might be tried in order to determine it, and then our judgment would be pronounced on a full and certain statement of every material fact. Certainly the fact that the plaintiffs and Noad & Co. have recovered *jointly* against Mr. Thomas McLean, for advances to him, seems strong to shew that the advances were in truth of that character.

Per cur.—Judgment for defendant.

BENEDICT ET AL. V. RUTHERFORD.

Promissory note—Assignment—How far the execution of an absolute release affects the original debt although the conditions are not fulfilled by assignor.

R. being indebted to B. and V. in the sum of \$979.76 gives his promissory note at six months, payable at the Bank of Montreal, in Guelph, with current rate of exchange on New York in September, 1859.

In June, 1860, R. made an assignment, to which B. and V. were executing parties, which after reciting an agreement by R.'s creditors to accept five shillings in the pound from R., payable in six and twelve months, to be secured by promissory notes satisfactorily endorsed, and a covenant by R. to pay that sum, contained an absolute release of R. from all those executing it. The plaintiff before executing this instrument claimed the promised endorsed notes, or to hold the original note till the compromise was paid.

On the 6th of August, 1860, another assignment was made by R., in trust, till he should pay his creditors their dividend, and was sent to the plaintiffs for execution, with the statement that he (R.) could not get the security wanted, "the party that promised to become a partner drew back."

This assignment the plaintiffs did not sign, because when the first offer fell through they sold the original note, and claimed to have nothing more to do with the matter.

Held, that the giving of the promissory notes by R. was not a condition precedent to the delivery of the first assignment, and that the execution and delivery of it, as it contained an absolute release, operated as a discharge of the original debt.

2. That the deed of the 6th of August did not annul the former assignment.
3. That this action being brought prior to the 1st of January, 1861, (when the first instalment became due on the assignment,) and the release in the instrument being absolute, the non-payment of that instalment did not remit the parties back to their original position, and the validity of the original assignment was not in question.

ACTION for goods sold and delivered, money lent, money paid, interest and account stated.

Pleas.— 1. Never indebted. 2. Release.

The trial took place at the Toronto assizes, in January, 1861, before *McLean*, J. It appeared that the defendant on the 16th of September, 1859, was indebted to the plaintiff in the sum of \$979.75, and on that day signed the note following:

\$979.⁷⁵/₁₀₀.

GUELPH, Sept. 16, 1859.

Six months after date, I promise to pay to the order of Benedict and Vance nine hundred and seventy-nine ⁷⁵/₁₀₀ dollars at the Bank of Montreal, with the current rate of exchange on New York, value received.

(Signed) ROBERT RUTHERFORD.

On this was endorsed "Pay to the order of Daniel Hill without recourse on us."

(Signed) BENEDICT & VANCE.

In June, 1860, an indenture was prepared between the several creditors of Robert Rutherford who should execute the same of the first part, and Robert Rutherford, of the second part; whereby, after reciting an agreement that the creditors should accept five shillings in the pound, payable in two equal instalments of two shillings and six-pence in six and twelve months, from the 1st of July, 1860, in full, and that they should release Rutherford from further liability, and that Rutherford should pay the five shillings in the pound, and should give promissory notes satisfactorily endorsed for such payments as aforesaid. It was witnessed, that Rutherford covenanted with the parties of the first part that he would pay to them respectively the said sum of five shillings in the pound on the days and times thereinbefore appointed for payment. And the parties of the first part did each for himself and themselves, covenant with Rutherford to accept the said sum of five shillings in the pound on the amount of their several claims; and "they, the said several parties of the first part, each for himself and themselves, and for his and their respective firms, do hereby remise, release, and for ever relinquish and quit claim unto the said party of the second part, his heirs, &c., all claims, debts, demands, damages, sum and sums of money, and all and every action and actions, suit and suits, cause or causes

of suit or action which he or they, or his or their heirs, executors and administrators, now have, or shall or may at any time hereafter claim or have against the said party of the second part, from the beginning of the world until the day of the date of these presents." This indenture was executed by the defendant, and has the names of the larger number of his creditors, the plaintiffs being of that number, attached to it as executing.

It was proved that the defendant's proposal preceding the execution of the forgoing indenture, was to give endorsed notes to secure the amount of composition offered. Before it was sent to the plaintiffs (who live in New York) for signature, they wrote in reply to a letter from defendant, (not in evidence,) "you do not state whether it (referring to the five shilling in the pound) is to be secured or not. If not we should want to hold the original note until the compromise paper was paid."

Three other letters, purporting to be written by plaintiffs, were produced by defendant, who was the first witness called for the plaintiffs, and were put in by consent of plaintiffs' counsel. In one of them, dated the 24th of July, 1860, is this passage, "Your favour of the 4th instant reached us in due course, covering your compromise paper, (evidently meaning the indenture above set out.) All your creditors in this city have signed with the exception of Dinwiddie & Co., and W. C. Ward." In a letter from the plaintiffs of the 3rd of August following, it is said, "Messrs. Dinwiddie & Co. have signed your paper."

But on the 28th of August, 1860, the defendant wrote to the plaintiffs enclosing a deed of composition and assignment in trust to Robert M. Moore, manager of the Bank of Montreal, in Guelph, until defendant should pay his creditors their dividend. He writes, "I could not get the security wanted; the party that promised to become a partner drew back," and explains why he selected the manager of the Bank of Montreal, that bank being his largest creditor.

The indenture enclosed in that letter bore date the 6th of August, 1860, and was made between the defendant of the first part, William Ross, James Mitchell, and John Fiskien,

trading under the firm of Ross, Mitchell & Co., of the second part. The Bank of Montreal, the City Bank, and the Bank of Toronto, being, with Ross, Mitchell & Co., all the creditors of defendant having rights under a certain indenture of 25th of July, 1856, and a certain decree in the Court of Chancery, of the third part; a great many parties named, the plaintiffs among them, and described as being all the creditors of defendant, except the parties of the second and third parts, of the fourth part; two persons described as assignees under an indenture of assignment made the 18th of January, 1860, of all the goods, credits, and effects of defendant, of the fifth part, and Robert M. Moore, as agent of the Bank of Montreal, of the sixth part. The creditors named of the fourth part, are not all executing parties to the deed of June, 1860, nor are all the parties whose names appear as having executed that deed parties of the fourth part in this.

This deed contained a number of trusts. The leading ones were, after payment of expenses, to allow a certain sum to be used in purchasing goods to enable defendant to carry on the business so as to wind it up to advantage, and to pay the parties of the second and third parts 10s. in the pound, and the parties of the fourth part 5s. in the pound, at 6, 12, 18, and 24 months, from 31st August, 1860. This deed was produced by Moore who proved the execution by Ruth-erford.

A letter from the the plaintiffs to defendant, dated 24th September, 1860, was also put in. It was a reply to his of the 28th of August, above noted. They state they have got all the parties (in New York) who signed the first to sign this, but that Ward would not sign. The letter proceeds, "You will doubtless be surprised at not seeing our names to your paper. Soon after you informed us the first offer and paper we had signed had fallen through, and after receiving the second paper we had an offer from a party to buy our claim against you and we have sold the note, so far as we are concerned we have nothing more to do in the matter."

Hill, to whom the plaintiffs endorsed the defendant's note of the 16th September, 1859, was a witness for defendant. He stated that this action was brought for his benefit; that he paid plaintiffs 5s. in the pound for the note. He was not

acquainted with the plaintiffs' writing, but he received the note endorsed as appears, through the Bank of Montreal, and a draft purporting to be drawn for the 5s. in the pound, which he paid. He supposed it was endorsed by plaintiffs. He said the endorsement on the note appeared to him to be the same writing as the signature of the plaintiffs' names to the deed of June, 1860. The learned judge noted that after the evidence of Hill, this deed was considered as put in.

The defendant on cross-examination, said Hill had sued him as endorsee of the note and failed, on the ground most probably that the introduction of the words, "with the current rate of exchange on New York," destroyed its character as a promissory note.

The plaintiffs' counsel contended that the second deed shewed an abandonment of that of June, 1860, and that the release therein contained of the plaintiffs' debt had thereby become void. The learned judge stated that it appeared to him this consequence did not follow. It was finally agreed that a verdict should be entered for the defendant with leave to the plaintiffs to move to enter a verdict for them for \$1043 45, if the court on the evidence consider the plaintiffs entitled to a verdict for that amount, the court to be at liberty to add the exchange on New York if ascertained, and the court consider plaintiffs entitled to recover.

In Hilary Term, *A. Macdonald* for plaintiffs, obtained a rule *nisi* to enter a verdict for the plaintiffs on the leave reserved. He objected that there was no sufficient proof of the execution of the release relied upon by defendant; that if there was proof of execution there was only a delivery as an escrow, until the delivery of the promissory notes therein mentioned. That the delivery of the promissory notes was a condition precedent to the operation of the release. That the defendant's failure to perform his part by delivery of the promissory notes, and making the first payment on the 1st January, 1861, remitted the plaintiffs to their original rights. That the deed of the 6th August, 1860, recognises the existence of the plaintiffs' original debt to the full amount at that date.

M. C. Cameron shewed cause. No objection was taken to the evidence of the execution of the release at the trial. There is no proof of delivery as an escrow, and the instrument contains no condition precedent. He cited *Good v. Cheesman*, 2 B. & Ad. 328; *Schack v. Anthony*, 1 M. & S. 573; *Tynan v. Bridges*, Cro. Jac. 300.

A. McDonald, contra, contended the instrument was still in the grantor's hands not yet delivered, not therefore binding as a deed. The defendant covenanted thereby, but had not delivered the deed containing the covenant, wherefore plaintiff had no new remedy. *Gudgen v. Besset*, 6 E. & B. 986; *Touch*, 57. The delivery of the notes was a condition precedent to the delivery of the deed. *Roberts v. Brett*, 6 C. B. N. S. 611; *Leake v. Young*, 5 E. & B. 955; *Ford v. Earl of Chesterfield*, 19 Beav., 428. Then the defendant under his hand and seal by the deed of the 6th August, 1858, acknowledges that he is indebted to the plaintiffs in the sum of \$979 76.

DRAPER, C. J.—Taking Mr. *McDonald's* objections in their order, I think the first fails, because no objection was raised at the trial to the proof of the execution by plaintiffs of the deed of June, 1860. There was some evidence of it, as well by comparison of hands, as of acknowledgement in one of the letters written by plaintiffs, that they had executed it. It was put in as part of the defence, and then both parties consented to a verdict, to be changed or modelled by the court, according to their opinion upon the evidence. After this it is, I think, too late to raise this objection.

The second, I think is met by the same answer, and by the further answer, that there was nothing to shew a delivery as an escrow. I apprehend from the evidence the deed was executed by the defendant, and a number of his creditors, when it was sent to the plaintiffs, and they procured the execution by other creditors, executed it themselves and returned it to defendant without limitation or qualification. The proper inference, I think is, it was absolutely delivered by all parties. Then as to the non-delivery of the promissory notes referred to in the second, third, and fourth objections.

The delivery of these notes is mentioned in the recital to the deed of June, 1860, as part of the agreement, but the defendant's covenant does not refer to it, and the creditors' covenant is to accept not the notes, but the payment of 5s. in the pound, in satisfaction of their respective debts. The words of the release are in the present tense. "Do hereby remise, release, and forever relinquish, &c., all claims, debts, &c., and the covenant and release by the creditors are not stated to be in consideration of or dependent on the payment or the delivery of the notes, or the agreement to deliver them. The creditors seem to have accepted the defendant's covenant to pay 5s. in the pound at a future date, and upon that to have given an immediate release of the whole debt. The dissimilarity of facts makes this case, in my opinion, very distinguishable from that of *Gudgen v. Besset*, and I think it equally distinguishable from *Roberts v. Brett*. I cannot construe the deed so as to make the delivery of the notes a condition precedent, for in the operative parts of the deed there is no reference either to the notes or to the preceding agreement, and the defendant's covenant does not incorporate the agreement. It is obvious that this deed was drawn without any reference to giving promissory notes at all, the statement of the agreement on that point being introduced into the recital in a marginal note, and from the initials written opposite to it, after several creditors had executed it, but it was forgotten that a similar alteration of the defendant's covenant would be more available for the creditors' rights and protection. This deed is drawn in a far less artificial and skilful shape than that of the 6th August, 1860.

The next objection is that the non-payment of the instalment of the first January, 1861, remitted the plaintiffs to their original position. Independently of the fact that this action was brought before that instalment became due, I cannot get rid of the effect of the language used in releasing the defendant from the original debt. It is unconditional and immediate in its operation, while the defendant's covenant was prospective in operation, and so was the agreement, for the promissory notes were to be at six and twelve months,

The last point raises, though perhaps not to the full extent, the question of the plaintiffs' right to recover.

Assuming, that on the evidence in respect thereto the deed of June, 1860, was complete in its execution, it gave the plaintiffs a right to insist on the fulfilment of defendant's covenant, and to recover one-eighth of their original demand on the 1st of January 1861, and a similar sum on the 1st July following. The deed of the 8th August, 1860, is not executed by the plaintiffs, and they were under no obligation, legal or moral, to execute it. They had already given up three-fourths of the debt due to them, and had given time to pay the remaining one-fourth. I see nothing to prevent their enforcing the covenant of defendant to pay this one-fourth.

Whether the non-payment of the instalment on the 1st of January last would, on the authority of *Leake v. Young*, and of *Ford v. The Earl of Chesterfield*, entitle the plaintiffs to the full amount of their original debt, it is not now necessary to decide. If this action had not been brought until after the 1st of January, the plaintiff might have raised it by declaring for both. And if the defendant set the release up as an answer to the first demand, the plaintiffs might have contended that the defendant's admission of the debt made in the deed of the 6th of August, 1860, was evidence that it was in existence then. But the present action was begun, and the declaration was filed before the 1st of January, 1861, and the plaintiffs cannot therefore recover upon any cause of action accruing after this suit was commenced, and there was no cause of action then, but the original demand.

Then, were the plaintiffs in a situation on this record to set up the admission in the deed of the 6th of August. I think, independently of any other consideration, there is a fatal obstacle in the form of the pleadings. The plaintiffs have simply denied the release, instead of confessing and avoiding it by the new matter, or new assigning, in one of which modes they might have raised the question whether, notwithstanding the release, they can recover the original debt. Even then, if they failed on this point, they could

not in this action have recovered for the instalment due on the 1st of January last.

I do not therefore see how we can make this rule absolute, but by consent of defendant's counsel we make a rule absolute to enter a nonsuit.

Per cur.—Rule absolute to enter a nonsuit.

ROSS, PLAINTIFF, (APPELLANT) V. ELLIOTT, DEFENDANT,
(RESPONDENT.)

Chattel mortgage—Taken as part security for the purchase money of the property—How far within the statute for avoiding preferential assignments—Con. Stat. U. C., ch. 26—Refiling not necessary when possession of the property is obtained within a year.

One A, sold to B, his interest in certain land, there being an amount due thereon, to obtain a title, part of which A., and the remainder B. was to pay, B. giving to A. certain personal property to the value of £100 and among it the horse in question in this suit for his interest in the land; but to secure the payment by A. of his share of the amount due on the land (£42 19s. 4d.) B. took from A. a chattel mortgage on the horse, which was duly filed.

An execution having issued out of the division court against A., the horse was sold under it and purchased by the plaintiff, B. being present and protesting against the sale. B. subsequently got peaceable possession of the horse, and the action of replevin was brought to obtain possession of it from him, the plaintiff claiming it under the division court sale.

Held, 1. That the transaction was not void as being a preferential assignment under the 18th section of the Con. Stat. U. C., ch. 26, it being a cotemporaneous security for the purchase money of property taken at the time of the sale.

That possession having been taken under default in the mortgage within a year from its filing, refiling for the protection of B's security was not necessary under the Statute.

APPEAL from the county court of the county of Carleton.

The facts material to the judgment of the court may be thus stated.

One Irvine sold the defendant his interest in certain real estate, on which certain sums of money were due, a large part of which defendant was to pay. Irvine had also to pay £42 19s. 4d., in order to enable defendant to get a title, and the bargain originally was that Irvine should pay this sum.

For Irvine's interest in this land the defendant agreed to transfer to him the horse which was the subject of this suit, together with other chattel property, valued altogether at £100. Before the transaction was carried out the defendant discovered that Irvine's circumstances were such that he

would probably not be able to pay the £42 19s. 4d. when it should become due, and to secure this it was agreed that defendant should let Irvine have the horse, &c., and that Irvine should execute to him a chattel mortgage thereupon conditioned to become void on Irvine's paying £42 19s. 4d., on the 1st May, 1860. This was done under legal advice. Accordingly a chattel mortgage was executed by Irvine to defendant on the 15th June, 1859, which, with proper affidavits, was filed in the office of the clerk of the county court on the following day. After executing this mortgage, and after it was filed, Irvine obtained possession of the horse, &c., and took him away with him.

In April, 1860, this horse was seized and sold on an execution issued out of the division court against the goods of Irvine. The plaintiff was the purchaser. The defendant was present and forbade the sale, setting up his claim under the mortgage.

About a fortnight afterwards the defendant obtained peaceable possession of the horse, whereupon the plaintiff brought this action of replevin. The defence set up was that by the mortgage and subsequent default in payment of the £42 14s. 9d., the property had become defendant's absolutely, and that his right could not be defeated by the sale under the execution in April, for nothing but Irvine's right to redeem could pass by that.

The plaintiff on the other hand objected to the mortgage, 1st, that it was void under the 18th section of the Con. Stat. U. C., ch. 26, and, 2nd, that it became void for want of a proper refileing before the expiration of a year from the 16th June, 1859.

R. A. Harrison, for the appellant, cited *Ferrie v. Cleghorn*, 19 Q. B. U. C. 241; *Billeten v. Young*, 3 Law T. N. S. 196; *Squair v. Fortune*, 18 Q. B. 547; *Robinson v. Paterson*, 18 Q. B. 55.

McBride, contra, cited *Ferrie v. Cleghorn*, 19 Q. B. U. C. 241, and the cases there referred to.

DRAPER, C. J.—I do not perceive upon what solid reason

it can be asserted that this mortgage was a gift, conveyance, assignment, or transfer of any of Irvine's goods with intent to give one creditor a preference over another.

Consider it as a sale made by defendant to Irvine, and that Irvine, unable to pay the full purchase money, paid part, and executed a mortgage on the property purchased to secure the balance, all being done at the same time—could that be deemed within the statute? Could the taking a security according to the express conditions of the dealing by which alone defendant became a creditor of Irvine's, make the transaction void as a fraudulent preference of defendant over Irvine's other creditors? If it could—by a parity of reasoning, if defendant had lent Irvine £42 14s. 9d., and taken a mortgage on any of his property to secure repayment, the security would have been void under the act.

The object of the legislature was to prevent the estate of a debtor, the common fund upon which all his creditors have an equal claim, being applied to the satisfaction of one, while the others were either wholly unpaid or paid a less sum than they would have got of the estate had it been rateably distributed. But this object can in no respect be contravened by the debtor acquiring new property, for which he makes but a partial payment, giving security on that same property for the rest of the price.

If Irvine had paid the defendant the £42 14s. 9d. when he got the horse, &c., the transaction could not have been impeached under the statute, or if he had paid for the chattels he got immediately in bills, bonds, notes or other securities or property, such a change of one kind of property into another never could have been construed or intended to give one creditor a preference over another.

I think, therefore, this mortgage was not void under the 10th section of the statute referred to.

As to the second objection. When the sale on the execution took place, (24th April, 1860,) Irvine had only a right to redeem the property on payment of £42 14s. 9d. on the 1st of May following. This interest was all that could pass to the plaintiff by the sale, and he also obtained the possession. It is mentioned as a condition in the mortgage that

if Irvine permitted any of the mortgaged property to be taken in execution, such property should immediately become the defendants, and there was no *express* condition that until default even Irvine should keep possession.

But it is in my opinion unnecessary to rest upon either of these considerations for the purpose of disposing of this objection. The defendant got possession of the horse on the 23rd May, 1860. This was after the time for redeeming the property by paying the £42 14s. 9d. had expired, and it was before the expiration of a year from the time of filing the mortgage. Being in possession there was no necessity for his refiling the mortgage to secure him as to this horse, and that is the only part of the mortgaged property in question in this suit.

The appeal must therefore be dismissed with costs.

Per cur.—Appeal dismissed.

GEORGE MACBETH, DEFENDANT, (APPELLANT) v. McDONALD,
ET AL., PLAINTIFFS, (RESPONDENTS.)

*Joint stock Company—Provisional directors—Personal liability—Relieving
of by properly constituted authority.*

Certain persons, seven in number, the defendant being one, were by statute incorporated as a body politic, under the name of the Amherstburg and St. Thomas Railway Company, with certain powers, among other things to obtain a certain amount of stock, which amount, as soon as it was obtained, a meeting of the general stockholders was to be called to organise the company.

These seven acting as provisional directors, passed a resolution authorising one M. R. to retain counsel to prosecute a certain suit in Chancery on their behalf, and on the same day the board of directors which had been previously chosen by the stockholders, passed a resolution to the same effect. The plaintiffs were thereupon retained, and proceedings in Chancery instituted, for the costs of which this action was brought.

Held, that the passing of the resolution being an illegal act on the part of those who did it, and the responsibility arising therefrom not being removed by the resolution of the general board of direction, the defendant as well as the others who authorised the retaining of the plaintiff, was liable therefor personally.

APPEAL from the County Court of the united counties of York and Peel.

Declaration, for money payable by the defendant to the plaintiffs for the work, labor, care, diligence, and attendance of the plaintiffs by them and their clerks and agents, before

one month prior to the commencement of this suit, made, done, performed and bestowed as the attorneys and solicitors of and for the said defendant and otherwise, and upon his retainer in and about the prosecuting of a certain suit lately depending in her Majesty's Court of Chancery for Upper Canada, wherein the Amherstburgh and St. Thomas Railway Company were plaintiffs, and William Wallace and others were defendants; and in and about prosecuting and defending and soliciting divers causes, suits, actions, and other business for the defendant; and for fees due and of right payable to the plaintiff in respect thereof, and also for divers counsel fees paid by the plaintiff for the defendant, and for counsel fees payable by the defendant to the plaintiffs, &c., &c. Also for money lent, and for money paid, laid out, and expended. And for interest due by the defendant to the plaintiffs. And for money found to be due from the defendant to the plaintiffs on accounts stated between them. And the plaintiffs claimed one hundred pounds.

Plea, never indebted.

The case was twice tried. On the first trial the jury found for the defendant, which verdict was set aside, and a new trial had by order of the judge of the County Court. On the second trial the jury found for the plaintiffs. The following evidence was given on the trials:

Edwin Larwill, for the plaintiffs. I was present at a meeting of directors in Amherstburgh, also at St. Thomas twice; I was provisional director.—Resolution of provisional directors, dated the 28th of August, 1856, produced as follows:—(Resolved that a suit be forthwith instituted in Chancery to restrain certain persons, namely, Wm. Duff, J. W. Redsdale, Peter Menzies, Jos. G. Kolfage, J. B. Bertholes, Theodore J. Park, and Wm. Wallace, from acting as, or pretending to be directors of this company, and that Miles O'Reilly be authorized to retain counsel and employ a solicitor for the conduct of the suit;) that is my signature at the bottom; I never had any thing to do with suits.—Minutes of the 28th of August, 1856, produced and proved, signature of Rankin.—(Resolved, that a suit be forthwith instituted in Chancery to restrain certain per-

sons, namely, Wm. Duff, J. W. Redsdale, Peter Menzies, Jos. G. Kolfage, J. B. Bertholes, Theodore J. Park and Wm. Wallace, from acting as, or pretending to be directors of this company, and that Miles O'Reilly be authorized to retain counsel and employ a solicitor for the conduct of the suit. Resolved that this meeting stand adjourned (subject to the call of the president in the interim) until the 8th day of October, ensuing. Done and passed at St. Thomas, on the 28th of August, 1856. Defendant's name is entered as present at both meetings.)

Cross-examined.—I was never a shareholder; I ceased to have anything to do with the company after the directors were elected; defendant was a shareholder to a small amount; he was a director on what was called Zimmerman's board; he was a member of parliament for Elgin.

Miles O'Reilly.—I instructed plaintiffs to commence a suit in Chancery by writings produced, which I gave to plaintiffs; on the 7th of August, 1856, there was a meeting to elect directors; two rival boards were elected; it was doubtful which was the right board; the suit was brought, and I continued to give instructions; afterwards, the rival boards agreed and united in forming a board, and then the suit dropped; I cannot tell who sent the papers to me, but I think I got them from Zimmerman personally; I have often seen defendant and supposed it was about the suit; as it was progressing he was very active in supporting the Zimmerman board.

Cross-examined.—At that time I was acting for Zimmerman exclusively, until I closed connexion by letter, dated the 23rd of March, 1857; I think I got directions from Zimmerman; I do not recollect ever referring to defendant.

David Blain.—I am clerk to the plaintiffs; I was employed in the suit; the work charged for was done; 1st date 1856, 5th August, instructions were charged in case of Zimmerman v. The Great Western Railway.

In the first place Zimmerman did instruct plaintiffs to file a bill for an injunction against the Great Western Railway Company; the opinion of counsel produced was got on the 20th of August; the suit went on until February, 1857;

defendant did call on the plaintiffs during the progress of suit.

Cross-examined.—The day-book produced belongs to the plaintiffs; the entry on the 5th of August is in Alexander Macdonald's writing, and the heading in John Macdonald's writing; there is correspondence in plaintiff's letter-book about the suit; there were no letters to defendant; there were some to Mr. O'Reilly.

Mr. Crooks objected.—No personal liability, all that defendant did being as a corporator.

The learned judge of the County Court having discharged the defendant's rule for a new trial, he appealed from the decision on the following grounds:

That the evidence shews the retainer (if any) on which the plaintiffs rested their right of action against the defendant was a resolution of the provisional board of directors of the Amherstburgh and St. Thomas Railway and a resolution of the elected board of directors of the said Company, of which directors the defendant was one; and that the said company being a corporation, the retainer (if any) was the retainer of the corporation, and therefore the defendant could not be individually liable to the plaintiffs in respect of such retainer. And on these grounds that the rule *nisi* in the court below should have been made absolute.

Adam Crooks, for appellant, cited 18 Vic., ch. 182, sec. 1, 2, 6; *Landman v. Entwistle*, 7 Ex. 632; *Hosking v. Phillips*, 3 Ex. 168.

McMichael, for respondent; *Davidson v. Grange*, 4 Grant Chy. R. 377; *Hallett v. Dowdall* 18 Q. B. 2.

DRAPER, C. J.—The statute 18 Vic., ch. 182, sec. 1, (passed the 19th of May, 1855,) incorporated several-named persons, the defendant being one, together with such person or persons as should, under the provisions of the act, become shareholders, into a body corporate and politic in fact, by the name of the Amherstburgh and St. Thomas Railway Company.

Sec. 6, provided for the stock £1,000,000, which amount was to be raised by the persons named, or some of them, together with such other persons as might become subscribers. The money raised to be applied in the first place towards payment of the expenses of procuring the act, and for making surveys, &c., and it provided that defendant and six other persons named in the act, should cause books of subscription to be opened. Every person whose name shall be written as a subscriber, and who, within 10 days after the closing the subscription book shall have paid ten per cent. shall become a member of the company. The seven could reduce subscription of shares if too many. Sec. 7. These same seven persons were empowered as soon as £500,000 stock had been subscribed, and ten per cent. paid in, to call a meeting of the shareholders to put the act into effect, and to choose nine directors.

Stat. 19 & 20 Vic., ch. 113, sec. 1, (passed 1st July, 1856,) enacted that as soon as £250,000 of the stock should be subscribed, and ten per cent. paid thereon, a general meeting of the shareholders should be held for the purpose of electing directors and putting the act into effect, as if £500,000 had been subscribed under the former act.

The term "provisional directors" is not contained in either act.

The seven persons named are part of twenty-four persons incorporated by the first act. These seven have certain specified powers, that of incurring any debt or expense, for which the corporation would be answerable is not among them unless incidentally; they might,

1st. Open subscription-books at certain places for thirty days, and afterwards at other places, until the meeting of the stockholders, giving certain notices.

2nd. They could allot the shares, if the total amount subscribed exceeded the capital stock reducing the number of shares of those who subscribed more than ten.

3rd. They could call the general meeting of stockholders.

The necessary expenses of doing these acts would no doubt form a part of what the company must pay. After a board of directors was elected, the authority of these seven

persons was extinct. A meeting to elect directors was called to be held on the 7th of August, 1856, and under the call, two meetings were held at different houses at Amherstburgh. Each meeting elected its board. The defendant was elected at one of these meetings on that day.

The present action is founded on a liability which accrued, if at all, after that day. Any act of this defendant, as one of the seven persons named in the first statute, after an election of directors, was an act of one of seven private individuals. The statute gave no authority for it; it could not affect or bind the company.

On the same day that the defendant, at a meeting of these seven persons calling themselves provisional directors, authorized the acts out of which the plaintiffs' claim arises, a meeting of the board of directors, of which the defendant formed one, was held, and a similar authority was given by that board. This authority, assuming the board well elected, would bind the corporation. But, granting that it did, (and the defendant has neither interest nor power to deny this conclusion,) if the defendant pledged himself individually, as well as pledged the company to certain acts, how does the latter pledge annul the former?

The object of the two resolutions was to obtain a judicial determination, which of the two boards of directors was legally elected. The application sanctioned by the defendant and his party was to restrain the rival board from acting as, or pretending to be, the board of directors of the company.

In the event of the election of the defendant's board not being upheld, the resolution of that board would be nugatory, at least so far as being binding on the corporation, and therefore, it was, as I suppose, that the so-called provisional directors passed their resolution also.

Most probably, they did not stop to enquire what authority they could derive under the statute for this proceeding, and in passing the resolution, took it for granted they were acting in execution of the statutory powers.

But I have no doubt they were not, and there is

nothing to shew that the plaintiffs have precluded themselves from holding each one of those who passed this resolution, to be personally liable. The proceedings were instituted and were dropped in consequence of a compromise between the rival boards. It is not therefore established, that the resolution of the defendant's board bound the corporation so as to give the plaintiffs any recourse against them. In my view, they had a right to look to the seven parties, who, professing to act as provisional directors, authorized their employment.

The cases cited on the argument of *Hallett v. Dowdall*, 18 Q. B. 2; *Hosking v. Phillips*, 3 Exch. 168, and *Landman v. Entwistle*, 7 Exch. 632, do not appear to me to be applicable to the peculiar facts before us.

If the defendant, in passing the resolution in question, had been acting within the powers conferred by the act, he would, in my opinion, have incurred no liability.

But, as I think, that by this resolution he pledged himself individually, I think the plaintiffs have a right to recover, and that this appeal should be dismissed with costs.

Per cur.—Appeal dismissed.

During this term the following gentleman were called to the bar:—PETER O'BRIAN, TIMOTHY BLAIR PARDEE, WILLIAM HEPBURN SCOTT, CHARLES FREDERICK GOODHUE, ALEXANDER BRUCE, JOHN ALEXANDER MACKENZIE, GEORGE WILLIAM DESVCEUX, GEORGE SUDLOW PAPPS, CORNELIUS DANFORD PAUL, CHARLES INGERSOLL BENSON, JAMES WINDEAT.

EASTER TERM, 24 VICTORIA.

Present:

The HON. WILLIAM HENRY DRAPER, C. B., C. J.

“ “ WILLIAM BUELL RICHARDS, J.

“ “ JOHN HAWKINS HAGARTY, J.

CAMPBELL v. GREER.

Agreement for sale of land—Instalment of purchase money paid—Abandonment of contract—Right to return of purchase money paid on agreement.

B. agreed to sell certain land, for which A. paid £50 down, and undertook to pay the balance in certain instalments, which, however, he failed to do, and the contract was abandoned, B. agreeing verbally, that if he could sell the land for more than the original agreement between A. and himself, to repay him the £50 paid on the original agreement. *Held*, that the abandonment of the contract was not proved to be the consideration for defendant's promise, and that there was no other consideration proved sufficient to maintain an action for the £50.

DECLARATION.—First count, that defendant having received from plaintiff £50 on account of the purchase money for lot No. 4, 4th concession South Monaghan, which defendant had by verbal agreement contracted to sell to plaintiff for £2,500, (but which contract was afterwards abandoned by mutual consent,) agreed with plaintiff in consideration of such abandonment to repay the £50 to plaintiff, provided defendant afterwards sold to another purchaser for a larger sum than £2,500. That defendant afterwards sold to another purchaser for £2,750, yet he refused upon request to repay the £50. Second count, for money received by defendant to plaintiff's use. 3rd count, on an account stated.

Pleas.—Did not promise as alleged. And, 2nd, never indebted.

The trial took place at Cobourg in March last before *McLean, J.*, and on the evidence then given, it appeared that plaintiff, in January, 1855, had verbally agreed with defendant to buy of defendant the land mentioned in the

declaration for £2,500. The sum of £50 was paid down, and £1,700 was to be paid in March or April following, and the balance in three (annual?) instalments. The defendant did not pay the £1,700 as agreed, having been disappointed in selling a farm of his own. In the fall of 1855, it was verbally agreed that the plaintiff should convey this farm of his to his brother Thomas, who should secure to defendant the sum of £1,700, of which £800 was to be paid on the 1st of June, 1856, £300 in the following October, and the rest in one year; the remaining part of the purchase money was to be paid by plaintiff according to the original agreement. When Thomas Campbell first made this proposal to defendant, and before it was verbally agreed upon, defendant said he could sell his farm for more than plaintiff was to pay, and if he did so he would repay plaintiff the £50. Plaintiff, defendant, and Thomas Campbell afterwards met, in order to reduce the agreement for the payment of the £1,700 to writing. The defendant proposed some modifications, which Thomas Campbell assented to, but the negotiation was broken off because defendant insisted on having security on the farm he was to convey to plaintiff, for the whole purchase money. In consequence of this the plaintiff gave up the bargain for defendant's farm. Defendant said he could sell it to some one else for more, and if he did he would pay plaintiff back the £50, and that would end all disputes. Thomas Campbell stated in evidence, that he thought if defendant had not said he would pay back the money, the plaintiff would not have looked for re-payment. Two witnesses (McCamus and Brown) both proved defendant's statement that he could sell the farm for more than £2,500, and would pay back the £50 to plaintiff, but these statements were made by defendant before the arrangement for payment of £1,700 by Thomas Campbell was broken off. The plaintiff was not present when Brown heard defendant say this; and McCamus speaks of a time when the terms of the bargain between defendant and Thomas Campbell were not adjusted. In November, 1856, the defendant entered into an agreement for the sale of his farm to one James Leach for £2,625, £1,000 of which was

paid by the 15th November, 1856. Till Leach received possession defendant had the use of the premises himself.

Upon these facts a nonsuit was moved for, which the plaintiff's counsel declined to accept, on which the learned judge commenced to charge the jury to give a verdict for the defendant, when it was agreed that a verdict should be taken for plaintiff, with leave to defendant to move to enter a nonsuit, if in the opinion of the court the plaintiff was not entitled to recover.

In Easter Term *S. Richards* obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial, the verdict being against law and evidence, there being no evidence, or no sufficient evidence to sustain the special count, and no consideration being proved for the promise therein stated, and that the evidence did not sustain the common counts, or, to arrest the judgment, the verdict being general, and the first count shewing no sufficient consideration, but only a past consideration. That it was not alleged that the plaintiff did abandon the contract, and that the contract itself was not a binding contract.

D. Bethune shewed cause. He contended that the abandonment of plaintiff's claim on defendant to have the contract carried out, was a sufficient consideration for defendant's promise, for without this abandonment the defendant could not have sold his farm to any other person. That the defendant assented to the contract being rescinded, and then the plaintiff was entitled to recover back the £50 as money received to his use. That if the contract was originally void, it was a fraud in the defendant to enter into it, then an action for money had and received will lie. That if the special count was bad, it was amendable. He contended that it was good and was proved; otherwise the court might direct the verdict to be entered on the count for money received, or on the account stated. He referred to *Richardson v. Mellish*, 2 Bing. 229; *Seaman v. Price*, 2 Bing. 437; *Seago v. Deane*, 4 Bing. 459; *James v. Cotton*, 7 Bing. 266; *Towers v. Barrett*, 1 T. R. 133; *Gosbell v. Archer*, 2 A. & E. 500; *Cockin v. Ward*, 1 C. B. 558; *Kaye*

v. Dutton, 7 M. & Gr. 807; Payne v. Whale, 7 Ea. 274; Hunt v. Silk, 5 Ea. 449; Giles v. Edwards, 7 T. R. 181; Beed v. Blandford, 2 Y. & J. 278; Clutterbuck v. Coffin, 3 M. & Gr. 842; Eastwood v. Kenyon, 11 A. & E. 438.

S. Richards, Q. C., supported the rule. As to arrest of judgment, he urged that the consideration stated was either past or future. If past, it would not sustain the promise, and the words "in consideration of such abandonment," referring to the words "which contract was afterwards,"—*i. e.*, after plaintiff had paid the £50, "abandoned by mutual consent," indicate plainly that it was past. If future in consideration that plaintiff would abandon, there is no averment that he had abandoned, and it is not averred the abandonment was at defendant's request. That the defendant always was willing to complete the sale, and agreed to modify the terms to suit plaintiff's convenience, but having been once disappointed and kept in abeyance several months, he was right in insisting on ample security, that the second proposal should be fulfilled. The default was entirely on the plaintiff's part, and when the second negotiation failed, he was unable to do any thing, and he had no remedy against, or claim upon defendant in respect of the first contract, (waiving the question of the Statute of Frauds) for he could not ground a claim upon his own default. The evidence does not shew that he gave up the contract to purchase in consideration of receiving back the £50. Nor did defendant agree to pay £50 in consideration of the plaintiff giving up the contract. The defendant's was a mere voluntary promise, and though apparently precise, is in truth vague and uncertain.

DRAPER, C. J.—I regret this protracted and unsatisfactory litigation, where there is so small an amount at stake as to be within the proper competence of the county court.

It appeared to the learned Chief Justice of the Queen's Bench, before whom the first trial took place, that the plaintiff shewed no right to recover on the common counts, but he left it to the jury on the first count, and they found for

the plaintiff. For the reasons reported in 10 U. C. C. P. 295, this court agreed with the learned Chief Justice as to the common counts, and were further of opinion, that the plaintiff had not sustained the special count, and therefore granted a new trial. The case was a second time tried before my brother *Burns*, and the jury again gave a general verdict for the plaintiff, which, being founded on the same facts as appeared on the first occasion, we considered wrong, and granted a new trial without costs, my brother *Hagarty* dissenting. The case has been brought to a third trial, and though the plaintiff's counsel would not accept a nonsuit, yet as the learned judge was charging against him, an arrangement was made, into which, considering the expressed opinion of this court, I am somewhat surprised the defendant's counsel should have entered, namely, to enter a verdict for plaintiff with leave to defendant to enter a nonsuit if in the opinion of the court the plaintiff is not entitled to recover, nothing, as I understand, having been left to or found by the jury.

The evidence on this trial, though given with somewhat more particularity, brings out no new facts of any importance. In the manner in which the case is reserved, I assume it is not intended we should simply determine whether there was any evidence whatever to be submitted to the jury; if that was the only matter in doubt, the plaintiff's counsel should either have taken a nonsuit in deference to the opinion of the learned judge, against which he might have moved, or declining a nonsuit, should have had the evidence left to the jury, and if the verdict was adverse in consequence of an adverse charge, he might, if there was ground, have moved for misdirection; but I apprehend the object of both parties in thus leaving the case to the court, was, that we should say whether, upon the evidence, a verdict for the plaintiff ought to have been rendered, not because there was some evidence for the consideration of the jury, but because upon that evidence, the plaintiff ought in our opinion to have succeeded. Indeed, unless this were so, I see no alternative but to grant a new trial without costs, because the jury have in fact found nothing.

I have gone over the evidence very carefully, and have examined every case cited for the plaintiff, and I continue of the opinion I formed on the first occasion. I think the reasons then briefly given for granting a new trial are applicable now, and have received no answer, and that the evidence given at the last trial has not substantially varied the case as presented at the first.

It certainly was no part of the original contract, that if the plaintiff was unable to complete his purchase by making the stipulated payments, he might rescind it at pleasure, and recover back what he had paid. I do not perceive either that it can be truly affirmed that the plaintiff, under the circumstances, has, by giving up the contract, either sustained a detriment himself, or has conferred a benefit on the defendant, at his, the defendant's request. The act done (*viz.*, the abandonment of the contract) is neither averred nor proved to have been done at the defendant's request, and it furnishes therefore no consideration for the subsequent promise. I agree that if anything be done at the express request of a party, for the doing whereof, nevertheless no action would lie, and therefore no implied promise would arise, a subsequent express promise may be sustained by the thing so done as a good consideration for the express promise, though past and executed (See *Townsend v. Hunt*, Cro. Car. 408.) But here there was no such request.

There is a note (quoted with approbation by Lord Denman, in *Eastwood v. Kenyon*) to *Wennall v. Adney*, 3 B. & P. 249, combating the idea, that an express promise founded simply on an antecedent moral obligation is sufficient to support an *assumpsit*, and which sums up the decisions up to that time thus, "An express promise therefore, as it should seem, can only revive a precedent good consideration which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

Upon the facts proved, I think the law will *imply* no

promise on defendant's part to repay the £50, and that the express promise is a mere voluntary undertaking, not founded on any consideration sufficient to make it binding. The evidence no more establishes that the defendant promised to pay in consideration that the plaintiff would abandon the purchase, than it does the converse, that the plaintiff promised to abandon in consideration that defendant would pay. The evidence of Thomas Campbell, the only witness to the material facts, shews that the plaintiff was unable to carry out the first agreement, and that the three parties could not settle the terms of a second, and that consequently, plaintiff "gave up the bargain for defendant's farm." So far as the impression produced on his mind is of any value, it shews that he had no idea the plaintiff was giving up the bargain in consideration that defendant would pay him £50, for he stated that if defendant had not said he would pay back the money if he sold the farm at a larger price, he (the witness) thought the plaintiff would not have looked for repayment.

In my opinion the rule for entering a nonsuit should be made absolute.

HAGARTY, J.—As the case comes before us on a motion to enter a nonsuit, I agree in the opinion of the learned Chief Justice, that our judgment should be for the defendant.

On a former occasion when it was expressly left to the jury to find if the abandonment of the contract by defendant was the moving consideration for plaintiff's alleged promise, and the jury so found, I was willing to let the verdict stand, a former jury having given a similar verdict. At the same time I would have found on each trial against the plaintiff had I been on the jury. Left to us now as a legal deduction to be drawn from the evidence on a motion for nonsuit, I think the plaintiff fails to make out a case.

Rule absolute.

TISDALE V. DALLAS.

Agreement—For sale and purchase of land—Covenants—For payment of money, not dependent upon fulfilment of covenants for title.

In an action on a covenant for interest due on an agreement for the sale and purchase of land, defendant pleaded, that the plaintiff, at the time of the sale and purchase had not, nor had he at any time since, a good and sufficient title to the land, and consequently plaintiff had no right to call upon defendant for payment.

2nd, that plaintiff ought to have been ready and willing to convey to defendant an estate in fee simple before he was entitled to call upon defendant for payment.

3rd, that the covenants were mutual and dependent, and plaintiff must be in a position to, and ready and willing to convey by good title before calling on defendant for the purchase money; that plaintiff hath not and never had, any title to the land. Upon demurrer,

Held, that the covenants are independent of each other, and that the defendant is responsible on his covenant, notwithstanding the plaintiff's inability to perform his.

DECLARATION—to pay £417 on the 4th of October, 1860, and for two half-yearly payments of interest.

1st plea, that the covenant was contained in an indenture of agreement for the sale and purchase of certain lands, dated the 4th of October, 1855, and made between plaintiff and defendant, whereby plaintiff agreed to sell to defendant lots Nos. 16, 17, 18 & 19, on the east side of Emerald Street, in a survey made upon a part of lot No. 11, 2nd concession Barton, for £500; and in consideration of the premises defendant agreed to pay plaintiff £500, £83 down and £417 at the expiration of five years, interest at 6 per cent. payable half-yearly. And in case of default plaintiff might sell the premises after three months' notice, and out of the proceeds retain the principal interest and costs, and pay the overplus to defendant, and plaintiff agreed *that on receiving payment* of the principal and interest in full to execute and deliver to defendant a good and sufficient deed for assuring to him the fee simple of the premises, with the usual covenants. And defendant covenanted not to carry on or permit the carrying on, on the premises any trade or business deemed obnoxious.

Averment, that plaintiff had not at the time of making the agreement, nor at any time since, nor hath he now any good or sufficient title to the said lands, or any part thereof, by

reason whereof plaintiff hath no right to call upon defendant for payments.

2nd, that before plaintiff was entitled to call upon defendant for payment, he ought to have been ready and willing to convey to defendant an estate in fee simple in the lands mentioned in the agreement. Averment, that plaintiff never has been ready and willing, &c.

3rd, that the covenants in the agreement were mutual and dependent on each other, by reason whereof plaintiff was not entitled to call upon defendant for payment without being ready and willing to deduce and make a good title to the lands in the agreement mentioned, and to execute and deliver to defendant a good and valuable conveyance thereof. That plaintiff had not at the time of making the agreement, nor afterwards, nor hath he now any right or title to the said lands, nor hath he deduced or made any good title thereto, nor hath he been willing or ready, &c.

Demurrer to each plea.

McMichael appeared for the demurrer.

A. Crooks supported the plea.

DRAPER, C. J.—The case of *Marsden v. Moore et al.*, 4 H. & N. 500, affirms the principle that the courts will determine by the terms of the instrument itself whether the covenants and conditions are concurrent or independent,—and in reference to *Pordage v. Cole*, 1 Saund.320, *Bramwell*, B., says, “the court construed the agreement as if it appeared on the face of it that there was no intention that the conveyance should take place on the day appointed for payment of the money.”

It cannot, on the part of the defendant, be set up that there is any covenant express or implied, that the plaintiff shall convey without at the same time receiving the balance of the principal money as well as the interest. But here part of the plaintiff's demand is for interest falling due six months before the whole purchase money would be payable, and the plea is pleaded as an answer to the whole, although it cannot be any answer as to this part.

This, however, is not the only difficulty. I do not see

how to get over the cases of *Sibthorp v. Brunel*, 3 Exch. 826, and *Mattoch v. Kinglake*, 10 A. & E. 50. *Manby v. Cremonini*, 6 Exch. 808, is the most favourable of any for the defendant that I have met with, but the agreement there differs in some material respects from that set out in this declaration, where the defendant's covenant is expressed to be in consideration "of the premises"—*i. e.*, that plaintiff had previously agreed to sell for the sum of £500.

I give judgment with unfeigned reluctance for the plaintiff, for it is in effect enabling him to enforce payment from the defendant for land, for which so far as this demurrer is concerned, we may assume he had no title when he entered into the agreement, nor when the plea was pleaded, and never has been ready and willing to convey to defendant. It may be said, and probably with truth, that had the defendant understood this was the legal effect of the instrument declared on, he never would have entered into it, but we must gather the intention from the construction which, according to decided cases, we are bound to put on the language used, and that construction, according to the authorities, is in the plaintiff's favor, and he must therefore have judgment.

Judgment for plaintiff.

See *White v. Beeton*, 7 Jur. N. S. 735.

BUELL V. WHITNEY.

Surety—Action against on bond—Writ—Special endorsement—Judgment on default.

A. & B. having become sureties for C., who was the receiver of moneys in a suit in Chancery, and who was to account yearly, were sued for C.'s default, on a specially endorsed writ and judgment signed for £490 16s. 10d.

Held, upon a motion on affidavit, as to the facts; that £92 11s. 9d., was all that was due, that the claim was not such that a judgment upon a specially endorsed writ could be signed, there being nothing to shew that if the plaintiff should recover the amount endorsed, the object for which the bond was given would be fully attained.

Prince, A., obtained a rule *nisi* in the practice court returnable here, calling on the plaintiff to shew cause why the final judgment entered in this cause should not be set aside for irregularity with costs, and why the proceedings thereon should not also be set aside and the goods seized by the sheriff under the writ of execution given up to the defendant on the grounds, that the claim was not one upon

which final judgment could legally be entered up a specially endorsed writ. Or why the judgment should not be set aside and the defendant be let in to plead on affidavit of merits, and that all proceedings be stayed.

From the affidavits it appeared that the copy of the writ of summons served on the defendant was specially endorsed thus, "The following are the particulars of the plaintiff's claim, £490 16s. 10d., on a recognizance dated the 6th day of July, A.D., 1856, conditioned for the payment by you of £3000." The usual notice was added that if defendant did not appear, &c., plaintiff would be at liberty to sign final judgment, &c.

There had been a report by the plaintiff as master in Chancery shewing that there was due to one H. G. and the defendant as sureties for one Thomas Forsyth, who was appointed a receiver in a cause depending in Chancery, the sum of £92 11s. 9d., with interest from the 16th of May, 1859, and costs. That defendant was informed and believed that H. G. had paid \$500 into court on this account, and that except as to his proportion of the sum of £92 11s. 9d., interest and costs, he the defendant was informed and believed that he had a good defence on the merits. It was also sworn, that by the papers filed in the cause, it appeared that the writ of summons was served on the 4th of April, 1861, and final judgment was signed as on a specially endorsed writ for want of appearance for £547 11s. 8d. and £5 2s. 2d. costs, and a writ of *fi. fa.* issued against defendant's goods on the 25th April. A copy of the decree and order in Chancery were also put in, from which it appeared that it was made in a cause of Fisher and others, plaintiffs, and Glass and others, defendants, and brought in question certain proceedings in the administration of the estate of one Thomas Fisher deceased, who died intestate, and that Forsyth gave a bond with defendant and H. G., as sureties, for his accounting, &c., as receiver. The fact of the payment of \$500 in full of the £92 11s. 9d., with interest and costs was sworn to. It was denied by affidavit on the other side, and the larger sum claim stated to be due.

W. H. Burns shewed cause. He objected that the name endorsed on the papers, or some of them, was that of an attorney before whom some of the affidavits on which the rule was obtained were sworn. He further objected that it was not sufficiently proved, that there was a judgment entered against the defendant, that an exemplification should have been produced. And that this special endorsement was right; that the action was one for a debt, and entitled the plaintiff to sign final judgment if the defendant did not appear, in support of which he cited *Hodsoll v. Baxter*, 4 Jur N. S. 556, and 1 E. B. & E. 884. He argued that this case did not come within the statute Wm. III., requiring the damages to be ascertained by a jury. He referred on this point to *Smith v. Broomhead*, 7 T. R. 300, and *Smithey v. Edmondson*, 3 Ea. 16.

A. Prince, contra. There was no appearance entered in the cause, no one therefore is attorney for the defendant on record, and *non constat*, that the attorney whose name is on some of the papers is the commissioner before whom the defendant made his affidavit. As to proof of judgment it is the invariable practice to state such proceedings on affidavit, and the production of an exemplification to the court on an application like the present was never heard of. Then as to the main objection, this is a bond in a penalty conditioned for the doing of certain things, paying over moneys being only one, and even as to money, the condition is not for the payment of one liquidated sum. It is clearly within the statute. He cited *Smith v. Bond*, 10 Bing. 126; *Green v. Becknell*, 8 A. & E. 701; 1 Chitty's Statutes, 325.

DRAPER, C. J.—The objections as to the commissioner before whom the affidavit was taken, and to the non-production of an exemplification were sufficiently answered during the argument.

As to the only remaining question, the cases cited of *Smith v. Broomhead* and *Smithey v. Edmondson* do not apply. The bonds mentioned in those cases were of a different character, and the Chancellor had express authority to order an assignment of them with the object of giving the penalty,

or a less sum, so that in effect he assessed the sum the assignee should recover, and the intervention of a jury being wholly unnecessary the statute of William did not apply.

In the present case there is nothing to shew us that if the plaintiff should recover the sum specially endorsed on the writ, the object for which the bond was given would be fully attained. There were annual accounts to be rendered and there might be future breaches of the condition, and if so, the judgment to be obtained on the bond for the amount of the penalty would stand as a security for the due fulfilment of the condition by Forsyth until the whole matters of the estate were finally wound up.

I think, therefore, this judgment is clearly irregular and should be set aside with costs.

THAYER V. STREET ET AL.

Bond—For conveyance of land—Choosing of land—Preparing deed—Whose duty.

Declaration on a bond conditioned that defendants should, on a certain day, or before, if they obtained a title, convey to plaintiff a certain quantity of land in one of two counties in one of the United States, to be taken from lands to be located by defendants.

Demurrer on the ground that it was plaintiff's duty to have selected the land and tendered a conveyance.

Held, that the defendants, having bound themselves before a certain day, to make a conveyance, if they obtained a title they would be more cognizant of the time when the conveyance could be made; it was their duty therefore to convey and not to wait till plaintiff tendered a deed.

DECLARATION on a bond of the defendants, dated the 4th of January, 1859. Penalty £750. Condition—that defendants, on or before the 1st of July, 1860, or sooner if patents were obtained, should convey to plaintiff in fee 300 acres in Iowa, to be taken from lands located by defendants.

Breach.—Defendants did not convey on or before the 1st of July, 1860, to the plaintiff in fee 300 acres.

Demurrer of defendants, that the plaintiff, according to the true construction of the bond, should have selected the three hundred acres to be conveyed, and tendered a conveyance of them to the defendants for execution, and that no allegation of such selection and tender, or either of them, is made in the declaration.

J. H. Cameron, Q. C., for demurrer, cited *Platt*, 142, 596, and *Stone v. Gilliam*, 1 Shower, 149.

Crooks, A., in support of the plea, cited *Mouck v. Stuart*, 4 U. C. Q. B. 203; *McDonald v. Snitsinger*, 5 U. C. Q. B. 312; *Burns v. Boyd*, 19 U. C. Q. B. 547.

DRAPER, C. J.—I think the plaintiff is entitled to judgment. The cases cited by Mr. *Crooks* appear decisive in his favour. Some of the observations of the learned Chief Justice of the Court of Queen's Bench, in *McDonald v. Snitsinger* (5 U. C. Q. B. 312) are very applicable. He says, "The obligor was to take his first step. It was peculiarly within his knowledge whether he had or had not got his right to land acknowledged by the government before the day when he was to convey. What land he should obtain would depend upon himself and the government. If the government should grant him none, or if the plaintiff should never learn what they had granted him, *he* could prepare no deed."

In *Burns v. Boyd*, (19 U. Q. B. 547,) the court referred to the former decisions, and upheld them.

No doubt the general rule is, that the purchaser must prepare the conveyance, but the court sustain a distinction, that where the vendor binds himself to convey on a certain day, there he must at his peril prepare and make the deed, for he cannot otherwise fulfil his undertaking to convey. Here there are two reasons why the defendants must do the first act. They have entered into an obligation to convey on a fixed day, or sooner, if they obtain the patent deeds sooner; and it is more in their knowledge than in the plaintiffs what lands they had then located, and have obtained the patent deeds for, out of which the three hundred acres are to be taken, I think that the defendants would have discharged themselves from this obligation by conveying, within the limited time, any three hundred acres of land in either of the counties named, which they had located at the date of the bond, and for which they afterwards obtained a good title.

Judgment for plaintiff on demurrer.

ATKINSON V. BEARD.

Lease—Reversioner—Measure of damages to—How far length of lease to be considered.

In an action on a lease (having many years to run) for rent and non-repair of the premises.

Held, that the reversioner by reason of the length of lease is not restricted to nominal damages, but the measure of damages is the amount to which the reversion is injured by the premises being out of repair.

DECLARATION.—The first count stated that plaintiff, on the 15th of January, 1856, by deed, demised to defendant certain premises in the city of Toronto to hold until the 4th of February, 1883, at certain rents therein specified. That defendant covenanted to pay the rent.

Breach—non payment of £100, due the 1st of October, 1860. Second count, that one W. A., under a lease, dated the 1st of May, 1850, made between the city of Toronto and the said W. A. was lessee for the term of 42 years, from the 4th of August, 1841, of certain premises (the land mentioned in the first count.) That W. A. having erected buildings thereon, by agreement dated the 4th of September, 1854, agreed to demise such premises and buildings to defendant for the residue of the term of 42 years, less six months, at the rent of £100 per annum, except as hereafter excepted, free of taxes; that defendant should hold the premises for the first six months free of rent in consideration of certain improvements to be made thereon by defendant, and of his getting tenants for the houses. That after the making this agreement W. A. died, leaving a will by which he appointed plaintiff his executrix, to whom probate was granted, whereby the interest of W. A. in the premises vested in plaintiff. And afterwards plaintiff by deed dated the 15th of January, 1856, demised the premises to defendant *habendum*, as in first count. And defendant covenanted that he had already made, or would within a reasonable time thereafter, make such improvements as he was bound to make by his agreement with W. A., and that he had procured tenants for the houses according to that agreement.

Breach—that defendant had not then, and has not since, made any such improvements, and had not procured tenants

for the said houses. Third count, setting out the lease from plaintiff to defendant, and adding, that defendant covenanted that he would, during the term, well and sufficiently repair and keep the demised premises in good repair, and all fixtures and things thereto belonging. That defendant entered. Breach—that defendant did not repair, &c., but that the houses, &c., were, during the term, and at the commencement of this suit, out of repair.

Pleas.—To first count, *non est factum*. To the second count, that before the commencement of this action he had made all such improvements as he was bound to make under the agreement with W. A., and had, at the time of entering into the covenant, procured tenants, &c. To third count, that the houses, &c., were not at the commencement of this suit out of good and substantial repair. To the second count, a plea was added by judge's order, that at the commencement of this suit a reasonable time for making the improvements mentioned in the agreement with W. A. had not elapsed.

The plaintiff took issue on all the pleas.

At the trial at the last Toronto winter assizes before *McLean*, J., the plaintiff proved that the rent was in arrear as stated in the first count, according to the terms of the lease which was put in and proved. It was further shewn that the premises were out of repair to the value of £40. The learned judge directed that as to the repairs, the plaintiff could recover only nominal damages, as the plaintiff was not in any way affected by the want of repairs. The jury, however, gave a verdict of £100 for the rent and £40 for damages for the breach of covenant in not repairing.

In Hilary Term, *Anderson* for the defendant obtained a rule *nisi* for a new trial, for excessive damages, and on the ground that the damages were assessed on a wrong principle.

In Easter Term *R. A. Harrison* shewed cause. He cited *Luxmore v. Robson*, 1 B. & A. 584; *Turner v. Lamb*, 14 M. & W. 412; *Vivian v. Campion*, 1 Salk. 141; 2 Lord Raymond, 1125; *Payne v. Haine*, 16 M. &

W. 541; *Smith v. Peat*, 9 Exch. 161; *Yates v. Dunster*, 11 Exch. 15; *Davies v. Underwood*, 2 H. & N. 570; *Bayles v. LeGros*, 4 C. B. N. S. 537; *Nixon v. Denham*, 1 Ir. Com. L. 100; *Bell v. Hayden*, 9 Ir. Com. L. 301; *McDonald v. Cameron*, 4 U. C. Q. B. 1.

Crombie supported the rule, and cited *Doe Worcester v. Rowlands*, 9 Car. & P. 734.

DRAPER, C. J.—The authorities establish very clearly that in an action such as the present the plaintiff is not necessarily limited to nominal damages, although the term may have many years to run, and consequently the reversioner will not for a long time be entitled to possession. In *Vivian v. Campion* (1 Salk. 141,) Lord *Holt* is reported to have said, "good damages are always given in these cases, because the damages recovered ought to be applied to the repair of the premises." In *Turner v. Lambe*, however, (14 M. & W. 412,) *Alderson*, B., and *Parke*, B., clearly intimate their opinion that the amount of damages to the reversioner must depend on the length of the term, and so far they limit the application of Lord *Holt's* judgment.

In *Doe v. Rowlands*, 9 C. & P. 734, *Coleridge*, J., told the jury that the measure of damage was the amount to which the reversion was injured by the premises being out of repair, and though in *Smith v. Peat*, (9 Exch. 161,) *Parke*, B., seems not wholly to assent to this rule, yet it is referred to in other cases, at least without disapproval, and has in my humble judgment much to recommend it, though if I were to hesitate at all in adopting it, it would be because it might in some cases operate too stringently against the rights of the reversioner. The decision in *Smith v. Peat* is, however, favourable to the plaintiff's claim for substantial damages, and so is that in *Davies v. Underwood* (2 H. & N. 570.)

Considering the plaintiff as by no means restricted in law to nominal damages, and there being no misdirection or omission to give a proper direction complained of in the rule, the case seems to turn on the question of excessive damages. By the terms of the covenant the defendant was bound to

keep the premises in repair at all times during the term, and it is proved that he has not done so, and if the term were at an end either by efflux of time or by forfeiture, the damages could not justly be complained of. Now, on this lease there is a power of entry reserved to the lessor on the breach of certain covenants; and it was asserted during the argument, and was not denied, that since the bringing of this action, and as I understand, since the trial, the plaintiff has entered into actual possession, with the assent, *tacit* at least, of the defendant. Under these circumstances it could answer no good purpose to grant a new trial, which could only be on payment of costs.

Per cur.—Rule discharged.

LOYD V. CLARK.

Land—Purchase of by lottery—Action for balance of purchase money—Stat. 12 Geo. II.

Declaration for £100, agreed to be paid by defendant to plaintiff for his right to a certain lot of land.

Plea, that one J. sold by way of lottery, contrary to the statute, to one V., whose right with full knowledge of the lottery plaintiff purchased and sold to the defendant with J.'s consent, who conveyed the premises to the defendant. On demurrer,

Held, that the plea was good as shewing a contract void under the stat. 12 Geo. II., and that the action is not maintainable.

The declaration stated that the plaintiff bargained for the purchase from one Jamieson of certain freehold property for £25. And in consideration that plaintiff would sell to defendant the said bargain, and would permit defendant to become purchaser from Jamieson of the said freehold, defendant promised to pay plaintiff £100, on the same being conveyed to defendant on the terms of the said bargain.

Averment, that all things had happened to entitle plaintiff to recover, yet defendant has not paid.

Plea, that the said freehold property was unlawfully bargained for by one Vanderwoort, with the said Jamieson, the owner thereof in fee, by agreement in writing with Jamieson by way of lottery, by a method or devise depending upon, or to be determined by lot or drawing as to what particular parcel of Jamieson's land Vanderwoort was to have, (the same not being determined by the agreement,) contrary to the statute. That the lottery took place, and

the said freehold property fell to the lot of Vanderwoort. That afterwards Vanderwoort transferred to plaintiff all his interest in the said freehold property, the plaintiff then having full knowledge of the lottery. That Jamieson assented to the transfer, and agreed to convey the land to plaintiff on the same terms, which he had agreed upon with plaintiff, which is the bargain alleged in the declaration between plaintiff and Jamieson. That afterwards by an agreement between plaintiff and defendant, plaintiff transferred to defendant all the interest which he had acquired from Vanderwoort, and the assent thereto by Jamieson, defendant being then fully aware of the lottery and the drawing and the transfer by Vanderwoort, which is the alleged sale to defendant. That Jamieson assented to such transfer from plaintiff to defendant, and agreed to treat with defendant upon the terms of the original agreement, and to deed the said freehold property to defendant, and in pursuance of such agreement, Jamieson did deliver to defendant a conveyance by deed of said freehold property, the consideration money being the same in amount as that originally agreed to be paid by Vanderwoort.

Demurrer.—That no sufficient facts were shewn to establish that the lottery and drawing were illegal; that the said drawing may have only been a partition by lot among parties having an equal interest, to divide as joint purchasers in which no risk was incurred and no prize to be obtained. That it is not alleged that plaintiff or defendant were parties to the agreement relating to the lottery entered into by Vanderwoort and Jamieson, or to the drawing, or aided in getting up, promoting or carrying out said lottery so as to invalidate the bargain between plaintiff and defendant, or the deed from Jamieson to defendant.

D. B. Rerz, in support of the demurrer cited *Coulter v. Lee*, 5 C. P. U. C. 201, 350; *Power v. Canniff*, 18 Q. B. U. C. 403; *O'Connor v. Bradshaw*, 5 Ex 882; *Knight v. Fitch*, 15 C. B. 566; 12 Geo. II., ch. 28.

Jellett, contra, referred to *Cronyn v. Widder*, 16 Q. B. U. C. 356; *Gass Co. v. Turner*, 5 Bing. 666; *Fisher v. Bridges*, 3 E. & B. 642.

DRAPER, C. J.—The plea does not state whether this transaction occurred after the passing of our stat. 19 Vic., ch. 49, or whether the defence is rested on British act, 12 Geo. II., ch. 28. It is unimportant, however, for the decision of the question raised, as it has been determined that the stat. 12 Geo. II. was in force in Upper Canada.

The only point for decision is, whether it sufficiently appears that the agreement between Jamieson and Vanderwoort for the sale of this freehold property was for a sale by lottery or device to be determined by chance or lot. If it was that agreement was void, for the plaintiff is expressly charged with notice thereof, and he brings his action to enforce payment of a sum of money, the consideration for which, as it in truth appears, is, that Jamieson should carry into effect the agreement with Vanderwoort, and convey the land in question to the defendant, who bought from plaintiff, who had purchased from Vanderwoort his right and interest arising under that agreement.

I think the plea sufficiently shewed that the agreement between Vanderwoort and Jamieson was void. It set forth that Vanderwoort unlawfully bargained with Jamieson for this freehold property, by way of lottery by a method or device dependent upon, or to be determined by drawing or lot, as to what parcel of Jamieson's land Vanderwoort was to have, *contrary to the statute*, the same not being determined by the agreement. That Jamieson assented to the transfer to plaintiff and defendant, and that defendant paid him the sum originally agreed to be paid by Vanderwoort.

The plea resembles that in Cronyn v. Widder, 16 Q. B. U. C. 356, to which no exception was taken, and the averment that the agreement was unlawful, for a sale by lottery or device to be determined by lot, contrary to the statute, is, I think, sufficient. The *onus probandi* of an illegal agreement contrary to the act of parliament for the suppression of lotteries is, I think, clearly assumed by the defendant, and the demurrer admits it.

In my opinion the defendant is entitled to judgment.

HAGARTY, J.—The plaintiff alleged that he, having a

right of purchase from Jamieson, sold such right to defendant for £100, and brings the action to recover that sum.

Defendant asserted that Jamieson sold by way of lottery to Vanderwoort; that plaintiff, with full knowledge thereof, purchased Vanderwoort's right to get a conveyance from Jamieson, who assented thereto; that afterwards plaintiff transferred his right so acquired to defendant for the sum sued for, the latter also having knowledge of the illegality, and that in pursuance thereof Jamieson, who recognized, and assented to the transfer, conveyed the premises to defendant. All these facts are admitted as pleaded. I think the plea sufficiently shewed an illegal sale by lottery. Jamieson certainly could not have enforced any mortgage or security taken for all or any part of the purchase money either against Vanderwoort, the plaintiff, or the defendant. I think it would be repugnant to all principles of law, in dealing with bargains illegal in their origin, to uphold the present claim. The statutes would be easily defeated if the lottery purchaser could openly sell his prize to a third person cognizant of its nature, and transfer to him the right to get the property obtained on this illegal bargain from the original owner. Plaintiff sells to defendant a claim against Jamieson, through Vanderwoort, which neither he nor the latter could lawfully enforce. Defendant thereby acquires no lawful right, and the action is thus brought for the consideration of the sale of an utterly illegal bargain. I think it impossible to support the claim. I refer to the language of the Court of Error in *Fisher v. Bridges*, 3 E. & Bl. 642, and to our own court of Queen's Bench judgments in *Cronyn v. Widder*, 16 U. C. 356, and in the case of *Cronyn v. Griffiths* 18 U. C. 396.

Judgment for the defendant on the demurrer.

MUIR V. LAWRIE ET AL. (EXECUTORS.)

Promissory notes—Bond given by executors on an accounting for balance due on certain promissory notes made by testator—How far an extinguishment of the original debt.

Declaration on three promissory notes given by testator in his life time for £21 5s., £55, and £40 16s., respectively.

Plea, that after testator died and the notes fell due, the plaintiff and defendants accounted together and struck a balance, for which the defendants gave their bond to pay out of the first moneys they should receive from the estate within eighteen months.

Held bad, as not shewn to be given in satisfaction of the notes or of cross-demands, and cannot therefore be pleaded for more than a payment *pro tanto* for the amount of it..

DECLARATION against executors on three promissory notes made by testator, one for £21 5s., payable twenty-four months after date, (1st January, 1855,) the second for £55, with interest, payable twelve months after same date. The third for £40 16s., with interest, payable twelve months after date, 11th February, 1859.

Plea, that after the testator died and the notes fell due, defendants, as executors, and plaintiff accounted together, of and concerning the said notes and divers sums of money then due, and to become due, from defendants as such executors to plaintiff, and of and concerning divers sums of money received by plaintiff on account of the said notes. And upon such accounting the defendants were found to be indebted to the plaintiff in £100. And thereupon it was agreed that defendants should give to plaintiff their bond for payment of the said sum, out of the first moneys that should come to their hands within eighteen months after the making of the said bond, and thereupon defendants did become bound by their writing obligatory sealed with their seals, and now in plaintiff's custody, to pay plaintiff the said money that should come to their hands within eighteen months as aforesaid.

Averment, that eighteen months have not expired, and that the bond is in full force.

Demurrer.—That the plea does not aver that it was ever agreed that the plaintiff should take the bond in satisfaction of the causes of action declared on, and that neither accord nor satisfaction is alleged in the said plea.

R. A. Harrison supported the demurrer. The plea does not shew cross-accounts—it shewed no satisfaction of the notes, nor any other bar, and if the bond was intended as a satisfaction it does not shew that plaintiff accepted it as such. The plaintiff is placed in no better condition than before. It is bad in form. The bond is not the personal bond of defendants. The accounting is all on one side and is therefore no bar. There is no consideration shewn for the accounting, and the declaration shewed a larger sum due than the plea meets. He cited *Smith v. Page*, 15 M. & W. 683; *Callander v. Howard*, 10 C. B. 290; *Perry v. Atwood*, 6 E. & B. 691; *Flockton v. Hall*, 14 Q. B. 380, and *S. C.* in error, 16 Q. B. 1039; *Brown v. Jones*, 17 U. C. Q. B. 50.

J. Bell, (Toronto,) contra, cited *Fearn v. Cochrane*, 4 C. B. 274; *James v. Williams*, 13 M. & W. 828; *Evans v. Powis*, 1 Exch. 601.

DRAPER, C. J.—The plea is pleaded in bar, and if it contains a good defence, it must be to the whole action, for if it be a suspension of the right to sue upon those notes, it will, I apprehend, be an extinguishment of the claim altogether (*Vide Bottomley v. Nuttall*, 5 C. B. N. S. 122; *Ford v. Beech*, 11 Q. B. 852, and the cases there referred to.)

In substance the plea amounts only to this, that in consideration that the defendants, who are executors of *Alexander Muir*, and are sued in that character, on three promissory notes given by the testator, gave their bond for payment of a certain sum, alleged to be the balance due after deducting certain payments, out of whatever moneys they should receive from the testator's estate within eighteen months after the bond was given, the plaintiff should give time for the eighteen months. If no moneys are received from the testator's estate during that period the bond will be of no value to the plaintiff, and the defendants will be under no personal liability. It is a merely conditional undertaking of the defendants as individuals, and gives the plaintiff no other or higher remedy against the the testator's estate.

It is not set up by this plea that the bond was given and accepted as a *satisfaction* of the original demand. But it is introduced by a statement that the defendants, as executors, and plaintiff accounted together of and concerning the said notes, and of and concerning divers sums of money due, and to become due, from defendants as executors to the plaintiff, and of and concerning divers sums of money received by plaintiff on account of these notes; that a balance was struck and thereupon defendants agreed to give this bond.

It is not very easy to understand on what ground the defence is really meant to be rested—whether that the striking a balance as set forth gave a new cause of action founded on that stating of accounts, and the implied promise of the defendants to pay the ascertained balance, or that the plaintiff took this bond as a security for the original demand payable at a future day, and cannot, until this security is due and unpaid, sue for the original demand.

It does not appear to me sustainable on either ground. There is no averment of an accounting respecting *cross-demands* of the defendants against the plaintiff; for the accounting respecting *payments* made upon the notes, or any of them, would not fall under that category, and could furnish only a defence *pro tanto*, and not operate to extinguish the right of action on the notes, and the authorities referred to apply to negotiable securities, which, being accepted for the original demand, may be deemed *payment* for the time, a conclusion which never can be drawn from the giving and accepting such a bond as the plea states. I think the plaintiff is entitled to judgment on this demurrer.

STREET V. THE CORPORATION OF THE COUNTY OF KENT.

Crown lands—Un-patented—Assessments on.

Plaintiff in the year 1853 purchased certain Crown lands through the Crown lands agent at Chatham, taking a receipt for the first instalment then paid, which stated, among other things, that in case any other person should have any claim for improvements, the sale should be cancelled; also, that no timber was to be cut on the premises in question excepting for the improvement thereof without the consent of the Crown land agent or first paying the purchase money in full.

In January, 1854 the commissioner of Crown lands, in supposed compliance with stat. 16 Vic., ch. 182, sec. 48, transmitted a list to the registrar of the county, (in the statement of case set out.)

Plaintiff paid all the instalments on the lands as they became due, but no patent, lease or license of occupation has been granted for the said lands, and the title thereto has always been vested in Her Majesty. The only right in plaintiff being that evidenced by the receipt, &c. The lands have never been in the actual possession or occupation of any person whosoever, and the plaintiff has always resided out of the county in which they are situate.

In the years from 1854 to 1859 inclusive, the lands were assessed for taxes, which, not being paid, the treasurer issued his warrant, and they were advertised accordingly. To prevent the sale being carried out, the plaintiff, under protest, paid the amount claimed for the assessments. *Held*, 1st, that statute 16 Vic., ch. 159, sec. 24, (Con. Stat. ch. 22, sec. 27) (since repealed,) was not intended for Upper Canada.

2nd, that sec. 13 Con. Stat. U. C., ch. 22, was mandatory and not permissive, and that a license of occupation should be issued to every person wishing to purchase, lease or settle on any Crown land.

3rd, that the lands in question were not subject to assessment as they were vested in the Crown, no license of occupation, lease or patent thereof having been granted by the Crown.

SPECIAL CASE.

In the year 1853, certain clergy reserve lands in the township of Tilbury East in the county of Kent, in all 1715 acres, the title to which was vested in Her Majesty, were purchased by the plaintiff from the Crown lands agent for the county of Kent on the terms mentioned in a receipt given to the plaintiff at the time of purchase by the said Crown lands agent at Chatham, where they were sold, of which receipt the following is a copy.

Chatham, 29th Sept. 1853.

"Received of Thos. C. Street, Esq., the sum of fifty-five pounds in payment of the first instalment and inspection fees on the clergy reserve lands included in the foregoing list, and containing by admeasurement 1715 acres, be the same more or less. This sale is, however, made with the express understanding that no claim to the said land exists in the part of any other person on account of improvements

or otherwise, and that should such a claim be established to any of the said lots, the sale, so far as they are concerned, will be cancelled. And further that no timber is to be used on the said premises excepting for the improvement thereof without first arranging with the agent or paying up the whole of the purchase-money, of which an instalment of one-tenth and interest from day of purchase becomes due on the first day of January in each year, without reference to date of sale.

"Signed,

"J. B. WILLIAMS, Agent."

Annexed to said receipt is a list of the lands referred to in the receipt.

During the month of January, 1854, the commissioner of Crown lands transmitted to the treasurer of the said county of Kent in supposed compliance with the 16 Vic., ch. 182, sec. 48, a list in the following form, the heading of which was all printed in the original, excepting the words in italics. under the column headed "name of lessee, patentee or purchaser," the plaintiff's name was inserted, following which the lots were mentioned, upon which the taxes in question were imposed; and under the column headed "remarks" the word "*clergy*" was set after them to distinguish them from *Crown* lands.

"Statement of lands granted or leased, or in respect of which a license of occupation has issued during the year 1853, in the townships of *the County of Kent*."

Sale. No.	Name of Lessee, Patentee, or Purchaser.	Part	Lot	Gore	Acres	Remarks
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The Plaintiff has paid all the instalments of the said purchase money and interest on the said lands on the days they respectively become payable. No patent, lease, or license of occupation was ever granted or issued for the said lands, or any of them. The title to said lands has always since date of the said receipt been vested, and still is vested in Her Majesty. The only right the plaintiff has or ever had to the said lands is what was acquired under the purchase evidenced only by the said receipt and the payment of the subsequent instalments, and such rights the plaintiff still possesses. No person has ever been in

actual possession of, or resided on, or ever occupied the said lands, or any of them, or any part thereof. The plaintiff has never been a resident in, or had a legal domicile or place of business in the said township of Tilbury East, or the said county of Kent, but has always resided in the county of Welland.

The said lands in the years 1854, 1855, 1856, 1857, 1858, and 1859, were (for the first time) assessed and returned by the assessors of the said township of Tilbury, and were designated on the assessment rolls for said years respectively as lands of non-residents, without the name of any owner or occupant. During each of the said years they have been rated for county purposes, but no part of the taxes having been paid, a warrant was issued by the county treasurer for the sale of the said lands, and they were duly advertised for sale by the sheriff of the county of Kent. The plaintiff, under compulsion and to prevent the sale of the said lands, but protesting against the right to assess or tax the said lands, paid the defendants the amount of the said taxes, £160 10s. 9., on the 13th November, 1860.

On the first of May, 1855, the treasurer of the county added 10 per cent. to the amount of the tax remaining due for 1854. On the 1st of May in each subsequent year the treasurer added 10 per cent. to the amount remaining due for taxes, computing the said 10 per cent. not only on the taxes for the previous year, but also on the 10 per cent. imposed or added in the preceding year.

The questions for the opinion of the court were :

1st, were the lands on the facts stated legally liable to be assessed and taxed for county municipal purposes.

2nd, in adding the 10 per cent. to the amount of tax due on the 1st of May in each year, was it legal to compute and add the 10 per cent. not only on the tax, but also on the 10 per cent. added on the 1st of May of the preceding year.

If the court should be of opinion in the affirmative thereof, then the plaintiff agreed that a judgment should and might be entered against him of *nolle prosequi* immediately after the decision of this case, or otherwise, as the court might think fit, but if the court should be of opinion in the negative

thereof on the first question, then the defendants agreed that judgment should be entered against them by confession for £160 10s. 9d., with interest from the 13th November, 1860, immediately after the decision of this case; but if the court should be of opinion in the affirmative on the first question, but in the negative on the second; then the defendants agreed that judgment should be entered against them by confession for £2 8s. 2d., with superior court costs of suit immediately after the decision of this case, or otherwise as the court might direct, and that judgment should be entered accordingly.

In Hilary Term last *Richards*, Q. C., argued the case for the plaintiff, and cited 16 Vic., ch. 182, sec. 48; *Henderson v. McLean*, 6 U. C. Q. B. 530; *Alexander v. Bird*, 8 U. C. C. P. 539.

Wilson, Q. C., for defendants, cited 15 Vic., ch. 159; sec. 6.

DRAPER, C. J.—According to the facts stated in the special case, the plaintiff was not the grantee or lessee of the lands in question, nor was there any license of occupation granted to him in respect thereof.

The Commissioner of Crown Lands might perhaps, under 16 Vic., ch. 182, sec. 48, have returned these lots as ungranted lots, of which no person had received permission to take possession, though from the language of the receipt for the first instalment of the purchase money, "that no timber should be used upon the premises except for the improvement thereof," without first arranging with the agent for Crown lands or paying up the whole of the price; it may be well inferred, that the purchaser, in taking possession, would not be deemed an intruder on the Crown domain. But it would appear that the return as actually made by the Commissioner of Crown Lands, in which he sets down the name of the plaintiff as purchaser, is not within the terms of the 48th section of the assessment law of Upper Canada.

It has been argued that the 24th section of the public lands act (Consol. Stat. of Canada, ch. 22, sec. 27, since

repealed) is applicable to this case. This section required the Commissioner of Crown Lands to transmit in January in each year "to the registrar of every county or registration district, and secretary-treasurer of any municipality in Lower Canada," a list of the clergy and Crown lands theretofore or thereafter sold, or for which licenses of occupation had been granted in such county or registration district, and upon which a payment had been made, which said lands should be "liable to the assessed taxes in the townships in which they respectively lie, from the date of such license or sale."

I think it clear that this enactment was not intended to apply to Upper Canada. The assessment act for that part of the province declared what lands should be taxable, and provided for a return to the treasurer of every county therein of lands granted or leased, or in respect of which a license of occupation had issued, and the 9th Vic., ch. 34, (Consol. Stat. U. C., ch. 89, sec. 80,) required a return from time to time, to each registrar in Upper Canada, of the names of all persons to whom Crown grants for lands in the respective counties had been issued. Without these enactments I should have thought the plain construction of the sentence made the words "Lower Canada" applicable as well to the registrars as to the secretary-treasurer, and with them I think there is no room for reasonable doubt.

At the same time I think there may be reason for concluding that the 6th section of the public lands act (sec. 13 of the Consol. Stat.) was mandatory and not merely permissive, and that a license of occupation should be issued to every person wishing to purchase and become a settler on any public land. It is needless to enquire whether the Commissioner of Crown Lands might not have read the word "and" as if it was "or," or have assumed that every purchaser intended to be a settler, since the last act, 23 Vic., ch. 2, sec. 16, removes all doubt in this respect, though it follows the form of language used in the previous acts, that the Commissioner of Crown Lands *may* issue the license of occupation.

Subject to certain objections all land in Upper Canada is

liable to municipal taxation. One of these exceptions is, all estate and property belonging to, or vested in, Her Majesty, and this exception is qualified by an enactment that the occupant of any land belonging to Her Majesty shall be liable to taxation for the land, (provided he does not occupy in some official character,) but the land shall not be chargeable for the same.

For the purposes of assessment the motive for requiring a return to the treasurers of lands granted or leased, or for which a license of occupation has been granted, is self-evident. And the license of occupation, which for the licensee's benefit is declared to be *prima facie* evidence of possession, is no doubt, for the purpose of assessment, evidence that he is occupant.

But the case showed that the plaintiff is not occupant in fact, nor has he a license of occupation; and the land is neither granted nor leased to him. I do not see that by the fact that the Commissioner of the Crown Lands has made a return of his name in a manner not pointed out by the act, he can subject him as occupant to be taxed for this land. The land itself was evidently not chargeable, because it was vested in the Crown. But if the lands themselves were not chargeable, and the plaintiff was not occupant, grantee, or lessee, the tax was not lawfully imposed, and the plaintiff should have judgment on the first question submitted.

We have not overlooked the 29th section of 16 Vic., ch. 159, referring to locations or sales made prior to that act, three months subsequent to the passing whereof this sale was made. Section 14 of Consol. Stat. Canada, ch. 22, also refers to sales made *prior* to the 14th of June, 1853.

Per cur.—Judgment for plaintiff.

HAMMOND V. HEWARD AND GRIER.

Promissory note—Brokers—Responsibility of one partner for the fraud of his co-partner committed on securities intrusted to co-partnership, after the dissolution thereof.

Plaintiff gave defendants who were co-partners and brokers two promissory notes, payable to their order to get discounted, and pay the proceeds to him, or to return the notes should they not be discounted. He afterwards drew upon the defendants for £200 on account of the notes. The defendants did not discount the notes while in partnership, but after the dissolution thereof, defendant, in fraud of his co-partner, endorsed the partnership name on the notes, and passed them away, and applied the proceeds to his own personal use.

Held, that the defendants were jointly liable, and that the draft for £200 did not annul the original contract or affect the responsibility of defendant Heward.

The declaration stated that defendants were brokers, and that plaintiff delivered to them as such, two promissory notes respectively made by plaintiff, each payable three months after date to the order of the defendants at the Bank of Upper Canada, one for £100 the other for £150, for the purpose of the defendants negotiating the same and raising money thereon for plaintiff, or in the event of their not negotiating the notes, then of returning the same to the plaintiff. That defendants accepted and received the notes for that purpose, and for reasonable reward in that behalf undertook, and it became their duty, to use proper care in negotiating the notes for plaintiff, or in returning them, if not negotiated, to plaintiff; that defendants so negligently and carelessly acted, that by their negligence and carelessness the notes before they came due were endorsed by defendants, and came so endorsed into the hands of one Robert John Grier without value being received therefor by the defendants, and afterwards the said R. J. G. delivered the said notes so endorsed to one W. J. A. who, without notice of the premises, paid to the said R. J. G. therefore £250, which money the said R. J. G. retained to his own use, whereby plaintiff became liable to pay, and afterwards was obliged to pay the amount of the said notes to the said W. J. A. There were also common counts for money lent, money paid, money had and received by defendants to plaintiff's use, and accounts stated, and for interest.

The defendant Heward pleaded, 1st, not guilty. 2nd, he traversed the acceptance of the notes by the firm of Heward & Grier for the purpose declared. 3rd, that the firm of Heward & Grier did, while he (Heward) was a member thereof, safely keep the promissory notes. That after the dissolution of the partnership, and after he (Heward) ceased to be a member thereof, the said R. J. G. in the declaration mentioned, in fraud of, and without the knowledge of defendant Heward, and without his fault and against his will, obtained possession of the notes, and held the same, and afterwards, in the like fraud, and without the knowledge, and against the will of Heward, transferred the same to the said W. J. A.

The plaintiff took issue on the pleas, and demurred to the third.

The case was tried in May last in Goderich before *Hagarty, J.* The plaintiff called the defendant Grier as a witness, who swore that he and the defendant Heward were partners in 1856, carrying on business at Toronto as brokers. That the plaintiff, who was a personal friend of his own, and was previously unknown to defendant Heward, came to defendant's office and signed the two notes mentioned in the declaration and left them in order that defendants, to whom they were made payable, might raise money on them for him. The defendants were to get the notes discounted and to return the proceeds to plaintiff, less their charges. That nothing was said as to what was to be done with the notes if they were not discounted, but of course plaintiff would get them back. Immediately after receiving the notes Grier endorsed them with the name of the firm of Heward and Grier, who were the payees, and he tried to get them discounted, but without success, until within a few days of their maturing, when he sold them to Dr. Anderson, and at the same time handed to him a mortgage, which Grier swore they had received from the plaintiff as security for the payment of the notes. Grier put his own name as an endorser on these notes when he discounted them with Anderson, and he applied the money to his own purposes. The plaintiff never received any of it. A few days before

Grier discounted these notes the defendants dissolved partnership. He stated that the articles of partnership gave him power to use the name of the firm, but he did not know if they gave him power to do this. After receiving these notes the defendants accepted a draft of the plaintiff for £200. Grier could not say whether the plaintiff retired it, but he told Grier that he had not done so. He (Grier) thought this draft had not matured when he discounted these notes. Grier stated he always had these notes; they were kept in a cash box in his desk which was put into the safe of the firm. The cash box had no lock. After the dissolution of the partnership he took the notes out of the cash box to make use of them. He stated that Heward was aware he (Grier) had received these notes to raise money for plaintiff, but he had no knowledge of the discounting them, and that he (Grier) had no authority to use the name of the firm after the dissolution. It was further proved that the plaintiff had been compelled to pay these notes to Anderson.

The learned judge told the jury that if the defendants publicly acted as partners in the broker business for raising money for parties, that they would be jointly responsible for securities entrusted to them for that purpose, and if they so received plaintiff's notes they were jointly accountable for them. That although on dissolution defendants' acts became thenceforth separate, the plaintiff had still a right as against both to require either the return of his notes or their proceeds, and that a wrongful conversion or disposal of the notes by one of them shortly after the dissolution cannot, in the absence of the rescission of the original contract, or a new dealing by the plaintiff with one of the former co-partners, relieve them from their joint obligation. He left the issue in fact on the third plea to the jury. The defendants' counsel objected that the jury should be told that as plaintiff drew on the firm for £200, it was an abandonment or rescission of the original contract, and put an end to the duty. The learned judge declined to give such a direction. The jury found for plaintiff generally.

In Easter Term *M. C. Cameron* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection.

Becher, Q. C., shewed cause. He argued that the learned judge left the question in the proper way to the jury, and that their verdict was amply sustained by the evidence. He referred to *Pozzi v. Shipton*, 8 A. & E. 963, 975; *Addison on Torts*, 735; 1 *Lindley Partnership*, 242, 243, 244; *Blair v. Bromley*, 2 Phil. 354; *Marsh v. Keating*, 1 Bing, N. C. 198.

M. C. Cameron, contra, argued that it was no part of the business of brokers to get bills or notes discounted, and therefore Grier had no authority to bind the firm by receiving these notes for that purpose. He referred to *Lindley*, sec. 246; *Bishop v. Countess of Jersey*, 2 Drew, 143. As to the demurrer, he admitted that if the declaration could be treated as framed, *ex contractu*, the plea was bad, but if, as he contended, the declaration was *ex delicto*, then the plea is a good answer to the declaration.

DRAPER, C. J.—Unless the verdict be wrong, it is of little importance whether the plea is a good answer in law to the declaration or no, for the jury have negatived it in fact. And I do not think that the finding is wrong, as contradictory to, or unsupported by, the evidence. In my opinion there was proof of a joint duty arising *ex contractu*, and then if there was a breach of this duty, which, on the part of Grier, is not only not denied, but the plea asserts it, I do not perceive how it could have happened without its being the fault, legally speaking, of Heward, who was a party to the contract.

The plaintiff's case may be thus briefly stated. He gave to the defendants, brokers in co-partnership, two promissory notes payable to their order that they might get them discounted and pay the proceeds to him, for which they were to receive reasonable reward. On this state of facts a duty arose to get the notes discounted, and to pay the proceeds to the plaintiff, or to return the notes to him. And the law would imply a promise on the part of the defendants to do this on request, when it appeared that the notes came into their hands in the course of their business as brokers, to

procure money upon them. Mr. Cameron argues that it was no part of the business of the defendants as brokers to procure notes to be discounted. Grier, however, in his evidence, states the reverse, declaring that he received them for this purpose, and that Heward was aware of it. These circumstances entirely distinguish this case from that of *Bishop v. The Countess of Jersey*, reported also in 18 Jur. 765. If it were necessary to refer to authorities to sustain the joint liability of the defendants in this case, I might refer to *Blair v. Bromley*, 2 Phil, 354, where a great many authorities are considered, and to *Sandilands v. Marsh*, 2 B. & A. 673. Mr. Heward is no doubt an innocent sufferer from the misconduct of his partner, but the plaintiff's dealing was with the firm, and he has, I think, a clear right to hold both partners liable.

The declaration is unnecessarily prolix. The plaintiff's cause of action might have been more simply and concisely stated. But no objection to its legal sufficiency has been raised, and I think enough is proved to entitle the plaintiff to recover.

I think the rule should be discharged, and that the plaintiff should have judgment upon the demurrer.

Per cur.—Judgment for plaintiff.

COTTER V. MUNICIPALITY OF DARLINGTON.

School section—By-law—Quashing of—13 & 14 Vic. ch. 48.

On a motion to quash a by-law passed on the 1st of October, 1859, by defendants, doing away with school section No. 7, in the Township of Darlington, and attaching a portion thereof to school section No. 6, and other part to No. 8.

Held, 1st, that it is unnecessary that a by-law should state on its face that the alteration shall not go into effect till the 25th December following the passing thereof—13 & 14 Vic., ch. 48, sec. 18, sub-sec. 4. 2nd, that no steps having been taken to quash a by-law for a year and more from the passing thereof, the decision in *Hill v. Municipality of Tecumseth*, 6 C.P. 207, adhered to, and the motion was refused on account of delay in making the application.

On the 4th of February, 1861, in Hilary Term, 24 Vic., *McLeod* obtained a rule *nisi* to quash a by-law passed on the 1st of October, 1859, by which school section No. 7, in the township of Darlington, was virtually annihilated, one portion of it being attached to, and made part of section No. 6,

and the residue of it attached to and made a portion of No. 8. No objection was urged to any thing apparent on the face of the by-law. The objections were, that there was no consent or request of a majority of the inhabitant householders or freeholders, and want of notice, and that the by-law did not express on the face of it, that it was not to come into operation until after the 25th day of December next after the alteration was made. At the time of granting the rule *nisi*, leave was given to file additional affidavits in support of the rule. Under some misapprehension the rule was drawn up giving the applicants leave to file affidavits in reply to the case made by the municipality. Whether the court would have done this, after hearing what was advanced in answer to the application, is one question, but we certainly should not do so before hand, for it is very easy to suggest the great inconveniences such a course might lead to.

McBride, in Easter Term answered the rule, filing affidavits, by which it was shewn that there was a petition to the township council for the alteration asked for, from a majority of the inhabitant householders and freeholders of section No. 7, and that notice of the intention to pass the by-law was duly mailed, addressed to the trustees of that section. He referred to *Sutherland v. Municipality of East Nissouri*, 10 Q. B. U. C. 626; *Hill v. Township of Tecumseth*, 6 C. P. U. C. 297; *Con. Stat.* 740, secs. 40, 41, 47; *Shaw et al. v. Municipality of Manvers*, 19 Q. B. U. C. 288.

McLeod produced further affidavits, denying the validity of some of the signatures to the petition, asserting that some of the parties whose names were to it, were not entitled to vote at school meetings, and denying therefore that a majority desired the change. There was also a denial on the part of the relator, one of the trustees for section No. 7, and one of his co-trustees, that they received any notice, and other inhabitant freeholders and householders swore they had no notice, and did not, or most of them did not, know of the change until November, 1860. The relator, however, stated that he had heard of a petition for the change, and that he attended the meeting of the township council, at which the by-law was discussed (not stating

when this was) and opposed it, but he was not aware until about the 5th of November, 1860, that such by-law had been passed. Three of the affidavits last put in stated the inconvenience to which the deponents were subjected by the change. He referred to *Shaw v. Municipality of Manvers*, 19 Q. B. U. C. 288; *Hart v. Vespra*, 16 U. C. Q. B. 32.

On the other side it was stated that nothing was done in pursuance of this by-law until after the 25th of December, 1859, but that since that time the by-law had been acted upon.

DEAPER, C. J.—The statute in force affecting this action at the date of passing this by-law was 13 & 14 Vic., ch. 48. The 4th sub-section of the 18th section provides, "that any alteration in the boundaries of a school section shall not go into effect before the 25th December next after the time when it shall have been made," but there is no enactment that this shall be expressed on the face of the by-law. The legislature having established the rule, and the by-law saying nothing inconsistent therewith, the latter will take effect according to the rule, and the omission to make such a provision in the by-law, cannot be deemed an objection to it in any form.

Then as to the other two objections, they are precisely of that class which should be promptly urged. Of course, if there be no notice that such proceedings are being taken there can be no charge of laches or delay. But it is difficult to understand the relator's alleged ignorance of the passing of the by-law, or his alleged want of notice, not of the by-law being passed, but "of the intended step or application," when he admits he heard of the petition, and attended the meeting of the township council, and opposed the by-law, which was then under discussion. He does not pretend that he then objected to the petition on any ground now suggested, or urged a want of proper notice.

Under these circumstances, we think it better to adhere to our decision in *Hill v. Municipality of Tecumseth*, 6 C. P. 297, and to refuse to quash this by-law on account of the delay in making the application. It was not even made in the term following the 5th of November, 1860, when the

relator admits he knew the by-law was passed, the first day of which term was the 19th of November.

Per cur.—Rule discharged.

WILSON V. BRECKER.

Trespass—Arrest—Evidence of—Not legally sufficient—Constructive—Power of attorney—Responsibility for an arrest committed under.

Plaintiff brought a suit in Chancery against defendant T. S. and S. W., which was referred to arbitration, and an award made thereon against plaintiff for £120 to S. W. and £154 to defendant. This award was made a rule of court by an *ex parte* order, and an attachment was issued by S. W. for both sums of money, the defendant having previously assigned all his interest in the award to S. W., and given him a general power of attorney to collect the amount. The only evidence of the arrest and imprisonment was given by the sheriff, who swore that "the attachment was received in his office on the 31st January, 1859, and the plaintiff was arrested on that attachment on the 16th February, 1859, and committed to gaol." It further appeared that the attachment was endorsed by the solicitor of S. W. as his solicitor only.

Held, that although there was no sufficient proof of an *actual* arrest, nevertheless sufficient evidence was given to warrant a jury in deciding that the plaintiff was constructively (at least) arrested by submitting to the process, and actually confined to gaol thereunder.

2nd. That the power of attorney given by defendant to S. W. being a general power to collect the money due on the award, and to do all acts relating thereto, he S. W. must be presumed to have been acting for the defendant, who was therefore responsible for the arrest.

TRESPASS for assault and false imprisonment.

Plea.—Not guilty.

The case was tried before *McLean*, J., at Toronto, in February, 1861.

It appeared that the plaintiff brought a suit in Chancery against the defendant, Tobias Switzer, the younger, and Seth Wilson. The suit was referred, and an award was made directing plaintiff to pay a specific sum to defendant, and another sum to Seth Wilson. The award was made a rule of court by an *ex parte* order, after which an attachment was issued against the plaintiff for non-performance of the award. The attachment was afterwards set aside with costs, and the court directed that the plaintiff should be discharged from custody.

To prove that plaintiff was arrested on this writ of attachment, it was sworn by the sheriff, that the attachment was received in his office on the 31st January, 1859, "the plain-

tiff was arrested on that attachment on the 16th February, 1859, and committed to gaol." The sheriff received the writ from Messrs. McDonald and brother, who endorsed it as solicitors for Seth Wilson. The gaoler proved that the plaintiff was brought to gaol in custody, on the 17th February, 1859, on an attachment in a suit in chancery of Tobias Switzer and others, and remained in custody on the same process until the 3rd of May following. The writ of attachment was put in and annexed thereto was a warrant under the sheriff's hand and seal, directed to several persons, the sheriff's bailiffs, commanding them to execute the writ. It had thereon an endorsement as follows:—"Mr. Sheriff: If the within named Moses Wilson pays you the within mentioned sums of £120 and £154, with interest thereon, from 26th January, 1859, together with your own fees, poundages, and incidental expenses, you may discharge him on this suit. Yours, &c., McDonald & Bro., for defendant S. Wilson." This and other endorsements on the writ was proved to be in the handwriting of one of the partners in the firm of McDonald & Bro. The sums mentioned were stated by the certificate of the registrar of the court to be £120 to Seth Wilson, and £154 to the defendant, Samuel Brecker, for non-payment whereof the now plaintiff was directed to be attached. The precipe for the attachment mentioned both these sums, payable as above, and was signed McDonald & Bro., defendants' solicitors. The answer of the now defendant in Chancery was filed by A. Crooks, as his solicitor, but his name did not appear in any subsequent proceedings. There was a power of attorney given by Brecker to Seth Wilson, to ask, demand, *recover*, &c., of and from the plaintiff, and all other persons whom it might concern, the sum of £150, with interest, appointed to be paid to Brecker, by the award in the Chancery suit, and to appoint an attorney or attorneys, and to do and perform all other acts, matters, and things necessary in and about the premises the same as Brecker could do if personally present. On the defence it appeared that Brecker had assigned to Seth Wilson all his interest in the moneys payable under the award, and had given the power of attorney in further-

ance of the assignment, both which documents were in the hands of Messrs. McDonald & Bro. There was put in evidence another order of the Court of Chancery in the same cause, restraining the plaintiff from further prosecuting the action against Seth Wilson and Alex. McDonald, who were sued jointly with defendant Brecker for the alleged trespass.

The learned judge told the jury that if defendant gave sufficient authority to his agent Seth Wilson, to proceed in making an arrest for the enforcement of the amount due, and his agent made such arrest, the defendant would be liable, if it were illegal. That it appeared the defendant had in truth no interest in the money, and did not interfere otherwise than by giving authority to Seth Wilson to enforce payment.

The defendant's counsel objected that the defendant was not sufficiently connected with the issuing of the attachment. That Seth Wilson must be presumed to have acted solely for his own benefit, the papers being signed only by McDonald & Bro., as solicitors for him. That the power of attorney only authorised Wilson to do what was necessary to collect the money, but not to make an illegal arrest because there was default in payment. That there was no legal evidence of any arrest under the attachment; the fact that the plaintiff was in gaol not establishing an arrest in this particular case.

The jury found for plaintiff—damages, \$200.

In Hilary Term last, *M. C. Cameron* obtained a rule nisi for a new trial, the verdict being contrary to law and evidence, and for misdirection in telling the jury, under all the circumstances, that defendant was liable by reason of the power of attorney he had given to Seth Wilson, and that such power was sufficient to make defendant liable, although it did not in terms authorise Seth Wilson to cause an arrest of plaintiff, and in directing that there was sufficient evidence that plaintiff was arrested on the attachment.

In Easter Term *Eccles, Q. C.*, shewed cause.

Cameron supported his rule on the ground that defendant did not himself employ the solicitors or authorise the arrest,

and that Seth Wilson never employed the solicitors on behalf of the defendant, and it was the direct act of the solicitors that caused the arrest. That Wilson had authority or interest to the extent of £120, and that any thing beyond that was mere excess, and the plaintiff's claim was limited to damages for this as an excess on the part of Wilson, and that there was no arrest of plaintiff proved. He cited *Roe v. Birkenhead &c., Railway Co.*, 7 Exch. p. 36, per *Parke B.*; *Wilson v. Tumman*, 6 M. & Gr. 236; *Blessley v. Sloman*, 3 M. & W. 40; *Copper v. Harding*, 7 Q. B. 928.

DRAPER, C. J.—The cases of *Berry v. Adamson*, 6 B. & C. 528, and of *Arrowsmith v. Lemesurier*, 2 N. R. 211, are as strong as any that have been suggested to shew there was no sufficient evidence of an arrest, but in my opinion this case goes much further; the plaintiff was conveyed to gaol, and was certainly in custody there under this writ, and detained for several weeks; it is true there is no proof of an actual arrest by the officer, but I think there is enough to warrant the jury in finding either that the plaintiff was arrested in fact or constructively by submitting to the process, which would be sufficient to prove an arrest according to the case cited in Bull, N. P. 92. It is to be observed that the plaintiff obtained his discharge from custody under this writ of attachment, by an order from the Court of Chancery, and there is no pretence that he had been arrested or taken under any other writ.

I feel no difficulty in saying that the defendant is sufficiently connected with the issuing of the attachment, to make him responsible. He had a claim against the plaintiff—he assigned it to Seth Wilson, giving him a very full power of attorney to enforce payment, and Seth Wilson placing the assignment and power of attorney in the hands of his own solicitors, authorises the proceedings to collect, as well the sum awarded to himself, as that awarded to and assigned by the plaintiff. I look on this act as an act authorised by the defendant just as much as if he had gone to the solicitors and had given the same directions that Seth Wilson did. In my opinion it makes no difference that the solicitors were employ-

ed by Seth Wilson only, for he had the defendant's authority to employ any person whom it might be necessary to employ to collect the debt. Suppose it had been paid, is there any doubt but that the defendant would have derived the very result he contemplated by his assignment to Seth Wilson? I think this conclusion abundantly sustained by the principles contained in *Collett v. Foster*, 2 H. & N. 356; *Guantlett v. King*, 3 C. B. N. S. 59; *Warner v. Reddiford*, 4 C. B. N. S. 180.

See also *Jarman v. Hooper*, 6 M. & G. 827; *Rowles v. Senior*, 8 Q. B. 677; *Semple v. Keen*, 3 H. & N. 753; *Freeman v. Rosher*, 13 Q. B. 780.

Per cur.—Rule discharged.

HOWLAND V. JENNINGS.

Promissory note—Interest recoverable at the rate drawn after maturity till payment.

Held, that interest is recoverable on a promissory note at the same rate for which it is drawn over six per cent. till payment.

DECLARATION on a promissory note, dated 17th January, 1860, for £100, made by the defendant and payable to the plaintiff one month after date.

Plea—*non-fecit*.

At the trial, at the Toronto assizes, in April last, the plaintiff proved the note sued upon, which was as follows:—

\$400.

KLEINBERG, 17th January, 1860.

One month after date, for value received, I promise to pay H. S. Howland, Esq., or bearer, the sum of four hundred dollars, with interest at twenty per cent. per annum.

The only question was whether the plaintiff was entitled to recover interest at the rate mentioned on the promissory note from the date till payment, or only at that rate until the note fell due, and from thence at the ordinary rate of six per cent. per annum. A verdict was taken for the plaintiff

for the full amount, with leave to defendant to move to reduce it.

In Easter Term *Bull* obtained a rule nisi accordingly.

McMichael shewed cause, contending it was a loan of money at a specified rate of interest till paid, and that the defendant ought not to be allowed to take advantage of his own wrong by making default, defending the action on a false plea, and so changing the contract into a loan for upwards of a year, at six per cent for the much larger part of the time. He cited *Morgan v. Jones*, 8 Ereb. 620.

Bull contra, referred to *Mayne* on damages 69; *Dickenson v. Harrison*, 4 Pri. 282; Sugd. V. & P. vol. 2, p. 828; *Upton v. Lord Ferrers*, 5 Ves. 801.

DRAKER, C. J.—The case of *Keene v. Keene*, 3 C. B. N. S. 144, is decisive on the question. If the defendant had taken the trouble to look at it, this motion need not have been made. It is referred to in the last edition of *Chitty on Bills*, p. 439, Note 7.

Rule discharged.

SMITH V. BURTON.

Promissory note—Notice of dishonour—Action by original holder against endorser—How far an answer in another action by another endorser and holder against a prior endorser.

Declaration on a promissory note, made by A. payable to B. (defendant) endorsed by him to C., who endorsed to D., who endorsed to plaintiff, and on the common counts.

Plea that said note before it became payable was endorsed by plaintiff to one J. H. C., who endorsed it to S. B. H., who endorsed it to the Commercial Bank, who were the holders when it matured, and until the recovery by defendant of a judgment upon an action brought by the said Commercial Bank, and that the notice of dishonour alleged to have been given by plaintiff to defendant is an alleged notice said to have been given by Commercial Bank to defendants in their suit, and no other notice, and that defendant in the suit between the Commercial Bank and himself recovered a judgment against the Commercial Bank, and that the plaintiff had notice of the action between the Commercial Bank, and defendant, before he became the holder of the note. On demurrer, held bad, the action between the Commercial Bank, the original holder, and the defendant, being no answer to an action by any other party on the note who was a subsequent holder to the defendant.

DECLARATION on a promissory note dated the 7th of

August, 1857, made by Robert Armour, payable to defendant, or order, endorsed by him to McDermot and Walsh, and by them to S. B. Fairbanks, and by him to the plaintiff, for £1,000 sterling, payable one year after date, with interest from date.

Common money counts.

Sixth plea to the first count and to so much of the second as claimed for money paid by plaintiff at defendant's request, defendant says that the money alleged to have been paid by plaintiff is the same identical money mentioned in the promissory note, and that plaintiff ought not to be permitted to maintain this action as endorser of the promissory note, for the said note, before it became payable, was endorsed and delivered by plaintiff to one J. H. Cameron, who endorsed and delivered the same to one S. B. Harman, who endorsed the same to the Commercial Bank of Canada, who were the holders thereof, when it became due, and until and after the recovery of judgments by defendants against the Commercial Bank as hereinafter mentioned, and the defendant is now the holder of the note in respect to a timesubsequent to the endorsement thereof to the Commercial Bank. That the notice of dishonour alleged in the declaration to have been given by the plaintiff to defendant is an alleged notice of dishonour said to have been given by the Commercial Bank when holders of the note, and alleged by them in their suit herein mentioned to have been given to the defendant, and not any other or different notice whatever. That before the commencement of this suit, and while the Commercial Bank were holders of the note, to wit, on, &c., the Commercial Bank impleaded defendant in the court of B. R. at Toronto, in an action on the said note to recover from the defendant as such endorser as in the first count mentioned (setting out the declaration in that suit against defendant), to which defendant pleaded among other pleas, that he had not due notice of dishonour, on which the Commercial Bank joined issue; that a trial of all the issues took place, and the jury found that the defendant had not due notice of dishonour, and on the 4th April, 1860, defendant recovered judgment on that issue and £27 2s. 7d. for his costs, and

judgment was duly entered on the other issues against the defendant; that plaintiff had notice of the action brought by the Commercial Bank and of the subsequent proceedings therein long before the time when he became the holder as implied or alleged in the said declaration.

Demurrer, because the judgment being between different parties is not conclusive on the plaintiff, and notwithstanding the facts alleged in the plea, the plaintiff can maintain this action.

Hector Cameron in support of the demurrer referred to *Doe v. Oliver and the Duchess of Kingston's case*, 2 Sm. L. Ca. 615, and to the notes thereon.

Adam Wilson, Q. C., and *Eccles* Q. C., cited *Pownal v. Ferrand*, 6 B. & C. 439; *Russell v. Blake*, 2 M. & Gr. 374; *McDonald v. Bovington*, 4 T. R. 825.

DRAPER, C. J.—This plea in effect is pleaded as an estoppel. It sets up that the notice of dishonour averred in the declaration, was the same notice and no other which the Commercial Bank in a prior action brought by them as holders of this note against the defendant, averred they had given; that the defendant in that action had denied that such notice was given to him, on which issue was joined, and that he obtained a verdict and judgment on that issue, wherefore he contends the plaintiff cannot raise the question whether he (the defendant) received that particular notice a second time.

The defendant does not assert in this plea that he never received that notice, nor any other notice of dishonour. His contention is that the Commercial Bank having failed in proving that he received the notice of dishonour which they averred they had given him, this plaintiff cannot again raise the question whether he did receive *that* notice, but that the verdict and judgment on that issue is final and conclusive on the whole world, and estops every person from asserting in another suit, brought on this note, that he did in fact receive it.

No authority has been cited which determines that ques-

on. The case principally, if not exclusively relied upon, is *Pownall v. Ferrand* (6 B. & C. 429,) which determined that the endorser of a bill paying a part thereof to the holder, might recover the amount so paid from the acceptor as money paid to his use. The holder had himself sued the acceptor, and had obtained judgment against him for the whole amount of the bill, but he had abstained from levying the sum which the endorser had paid him. The endorser brought an action against the acceptor to recover from him the sum paid, as money paid to his use, and the acceptor insisted that the endorser could only sue him on the bill, and that if he (the endorser) had paid the whole bill he would only have been remitted to his original right. The court were of opinion that there might be great difficulty in suing upon the bill, for the acceptor might have pleaded a recovery of the whole amount of the bill, but as the endorser was bound and compelled by law to pay the holder, and as the acceptor had received the benefit of that payment, the action for money paid to his use would lie.

The cases are in my opinion by no means parallel. This plea sets up an estoppel, and in order to bind the plaintiff as in privity with the Commercial Bank, it should be shewn that he claims by, through, or under them, and this is in effect stated in the latter part of the plea where notice of the suit of the Commercial Bank against the defendant, and the proceedings therein, is averred "long before the time when he, the plaintiff, became the holder as in the first count implied or alleged of the said promissory note after the endorsement of the same to the defendant, and its subsequent endorsement to the Commercial Bank."

But this statement, if it means anything, is based on a fallacy. The defendant, as endorser of this promissory note, stood in the situation of a drawer of a new bill, as to all subsequent holders, and when the maker failed to pay every prior endorser was liable to the then holders. The Commercial Bank being such holders sued the defendant, and failed, because they failed to prove that they had given him notice of dishonour. We must assume on this record that the plaintiff was obliged to pay, and did pay them, and so took up

the note. By so doing he acquired no *new* right as the plea suggests, but was remitted to the right which he had when he had endorsed away the note, namely, that if he had to pay it he could call upon prior parties and upon the defendant, as a prior endorser, provided he fulfilled certain conditions precedent, of which the giving notice of dishonour was one. The plaintiff's only recourse against the defendant was upon the note, to which he does not derive title from, through, or under the Commercial Bank, endorsers subsequent to himself. His title was prior to them, and though suspended when he endorsed away the note, and even though liable to be extinguished by the defendant's paying the note when in other hands, revived in full force, subject also to the same conditions, when the plaintiff, in fulfilment of his contract with subsequent holders, paid the note, and so became again the lawful holder thereof.

In this state of facts I do not perceive how the plaintiff can be estopped from proving what the Commercial Bank failed to prove, that the notice of dishonour which they averred they had given to the defendant, was duly given and received by him. If the fact be otherwise the defendant sustains no prejudice, but if such be the truth, I see no principle of law which prevents the plaintiff from shewing the truth. The plaintiff is striving to establish a right on a contract existing between himself and the defendant before the Commercial Bank had any right or interest in the note, and I do not see how their failure, on a question not at all events affecting the validity of the note or of the defendant's endorsement, if that would make a difference, can prevent his being heard.

I think the plaintiff entitled to judgment.

Per cur.—Judgment for plaintiff.

ALLARDICE V. DISTEN.

Lease—Covenant to repair—Buildings not fixed to freehold—How far applicable to.

In an indenture of lease, D. covenanted with A, at all times during the term, to repair, support, amend, and keep the demised premises, with all necessary reparations and amendments whatsoever, and the said premises so repaired, with the appurtenances, and all things which at the time of the execution of the said indenture were, or at any time during the term, should be fixed or fastened to or set up in or upon the premises, at the expiration of the term peaceably to yield up to A., with all and singular the fixtures thereto belonging, in as good condition as the same were at the execution of the indenture, reasonable use excepted.

Held, that the covenant entered into by D., extended to a building resting on blocks of wood, not let into the ground, also to a building resting on stumps, and also to a building laid upon scantling and old posts, not let into the ground, all placed on the demised premises during the term.

DECLARATION on covenants in a lease made by plaintiff to defendant, of certain premises in the city of Hamilton, dated the 19th of September, 1849, for ten years, from the 1st of October, 1849; wherein the defendant covenanted to pay all taxes, rates, &c., to be charged upon or in respect of the demised premises, and at all times during the term to repair, support, amend, and keep the premises with all necessary reparations and amendments whatsoever, and the said premises so repaired, with the appurtenances and all things, which at the time of the execution of the indenture were, or at any time during the term, should be fixed or fastened to or set up in or upon the premises; at the expiration of the term peaceably to yield up to the plaintiff, with all and singular the fixtures thereto belonging, in as good condition as the same were at the execution of the indenture, reasonable use excepted.

Breaches, 1st.—Non-payment of taxes imposed during the term. 2nd. Non-repair during the term of the premises. 3rd. That defendant left the premises at the expiration of the term in a worse state of repair than they were at the execution of the lease, and in bad order, besides reasonable use, and several buildings and erections, which during the term were set up in and upon the premises were, before the expiration of the term, removed.

Pleas, 1st.—Payment of all taxes. 2nd. That defendant did well and sufficiently repair. 3rd. That defendant did at

the expiration of the term yield up the premises, repaired, supported, and amended, with the appurtenances, and all other things which were at the execution of the lease, fixed, fastened, or set up in or upon the premises, and all things which at any time during the term were fixed, fastened, or set up in or upon the premises, with the fixtures to the same belonging, in as good condition as the same were at the execution of the indenture.

The case was tried at Hamilton, in March last, before *Richards, J.* The only question that arose was on the third breach, there being no defence to the plaintiff's recovery on the first and second. As to this, it appeared that in 1855, an under-tenant of defendant put up a small building on the demised premises, which stood on blocks of wood not let into the ground, and that this was removed away shortly before the term expired. Another small building was built or rested upon stumps on the premises, and was in like manner removed. Both these buildings were of wood. Then there was a third building, being an old frame which was brought upon the premises and filled in with brick, which building was laid upon scantling and old posts, not let into the ground, which was also removed. The three were valued at \$100. The jury gave a verdict for plaintiff for \$202.92, including the \$100 for these three buildings, with leave reserved to defendant to move to reduce the verdict by \$100, if the court should be of opinion that under the covenant the plaintiff was not entitled to recover for the buildings removed.

In Easter Term, *Burton* obtained a rule *nisi* to reduce the verdict on the leave reserved.

Freeland shewed cause. He referred to *Martyr v. Bradley*, 9 Bing, 24; *Rex v. Inhabitants of Otley*, 1 B. & Ad. 161; *Nouaille v. Flight*, 7 Beav. 521.

Burton, contra, argued, that the last words "in as good condition as the same *now* are," over-rode the whole covenant, and shewed that by "all things," only appendages or appurtenances to buildings already erected and forming part of the demised premises were included. He cited *Naylor*

v. Collinge, 1 Taunt. 19; West v. Blakeway, 2 M. & Gr. 729; Bishop v. Elliott, 11 Exch. 113.

DRAPER, C. J.—The question is what the parties meant by “all things,” which at the making of the lease, “or at any time during the term, should be fixed or fastened to or set up in or upon the premises,” with all and singular the fixtures “thereto belonging.”

If the term used had been “all buildings,” then, according to Naylor v. Collinge, (1 Taunt. 19,) only buildings which are affixed to the soil would be included, and not such as were built or supported on blocks or pattens of wood laid upon the ground. But the word “things” has no such restricted sense as is given in law to the word buildings, as belonging to or forming part of the realty. And this is the defendant’s covenant, and is to be taken most strongly against him.

It appears to me impossible to contend that these buildings, as described by the witnesses, were not *things set up* on the demised premises. The parties obviously contemplated something more than “*fixtures*,” for the covenant makes a special mention of fixtures as what might be belonging to the “things” to be delivered up, and to be delivered up with such things. The language used seems calculated to meet the very sort of buildings set up, and it is difficult to give it a meaning which would exclude them.

As to the expression “in as good condition as they now are,” it may be confined to things in existence when the lease was made, reserving to the landlord the right to have all things set up during the term left on the premises at its expiration, in whatever condition they might then happen to be. The case of White v. Nicholson, 4 M. & Gr. 96, shews that, in order to give reasonable effect to a covenant, this court will adopt a construction limiting the ordinary meaning of the word “now,” by reference to other expressions in the same instrument.

I think the rule should be discharged.

Per cur.—Rule discharged.

PRESTON V. TWIGG.

Surety—Evidence of payment by plaintiff at request of defendant.

T. being the owner of a lot of land mortgaged it to the Kingston Building Society, and subsequently entered into an agreement for the sale of it to S., getting P. & B. to join him in a bond subject to a condition that if T., on a certain day in March, 1855, or as soon after as the Kingston Building Society should expire, should convey the land in question to the obligee on his making specific payments to T., the bond should be void. T. having neglected to make the monthly payments due to the building society on the mortgage, under a power of sale therein contained, the society, on the 13th Sept., 1856, sold the land to one W., for £200, being £185 more than the amount due to the society. P. B. & S. having heard of the sale entered into an arrangement with W., whereby he agreed, in consideration of the payment to him of £350, to convey the land to S. T. gave to P. an order to receive the balance of the £200 in the possession of the Building Society after the payment of the claim, which being deducted from the £350 to be paid, W. left the sum of £214 18s. 11d. to be made up to complete the payment to W. This sum was paid to P. B. & S., paying each one-third, amounting to £71 12s. 11d. T. was apprised of this arrangement, and said he would pay the whole amount if he could, and that he would make up \$100, which he did not do. The jury having found a verdict for P., for the amount paid by him and interest thereon, *Held*, that there was evidence sufficient to justify a finding that the money was paid by P., at the request of the defendant T.

DECLARATION for money paid by plaintiff for defendant, at his request, money lent, money received by defendant, interest, &c., account stated.

Pleas.—Never indebted and payment.

The trial took place at Cobourg, in March, 1861, before *McLean, J.* It appeared that the plaintiff and his brother Isaac Preston joined defendant as his sureties, in two bonds, to one Michael Sissen, each bond being subject to a condition that if defendant, on a certain day in March, 1855, or "as soon after as the present building society, known by the name of the Kingston Building Society, should expire," should convey certain land named in such condition, upon the obligee making certain specified payments to the defendant, the bonds should be void.

The obligee entered into possession soon after the making of the bonds, and so far as appeared, duly made his payments. It was known that the land was under mortgage to the Kingston Building Society, and the object of these bonds was to indemnify Sissen against that incumbrance, the defendant engaging to make the monthly payments to the

society until it wound up. But he allowed these payments to fall in arrear for twenty months, and the society, in exercise of a power contained in the mortgage, sold the land on the 13th of September, 1855, there being then due £57 4s. 3d., besides costs amounting together to £63 13s. 11d. The defendant had notice forwarded to him of this sale, but it did not appear that either the plaintiff or his co-surety were aware of it, until after it had taken place. Mr. R. Wallace became the purchaser for £200, which he was to pay the society, the surplus, after satisfying their claim, somewhat exceeding £135, to which, as between them and the defendant the latter was entitled. But the plaintiff and his co-surety, together with Sissen, becoming aware of the sale, made an arrangement with Wallace on the 27th Sept., 1855, by which he, on condition of being paid £350 in one month agreed to convey to Sissen. The transaction was entered in the society's books, treating Wallace as the purchaser, and acknowledging the receipt of £200 from him, crediting the defendant with payment of what he owed, and placing the balance subject to his order, and he on the 22nd September, 1855, gave an order on the treasurer of the society in favor of the plaintiff for this balance. The defendant was apprised of this arrangement, and said he would pay the whole amount if he could, and seemed sorry for their having to pay so much money, and said he would make up \$100, but did not. The money then actually required to be paid was £214 18s. 11d., £150 of which Wallace was to receive as profit, and the residue going to the building society, and the plaintiff, Isaac Preston, and Sissen, each paid one-third, amounting to £71 12s 11d. The building society was wound up in October, 1855. The payment to Wallace it would seem was made about the end of that month. At this time the land was considered worth from £700 to £800. The price at which the defendant sold it to Sissen averaged \$11 per acre. In July, 1856, the defendant received a small balance of £4 2s. 6d. from the building society, which closed the transaction between them.

The jury found for plaintiff with interest £95 7s. 11d.

It was objected that there was no legal obligation on the

defendant, to re-pay the money which the plaintiff advanced to get back the land from Wallace. That there was no breach of the condition of the bond at the time the plaintiff paid this money, as the condition was that the defendant should give Sissen a deed in March, 1855, or as soon after as the Kingston Building Society should expire, and that event did not happen until October, 1855. Leave was reserved to move for a nonsuit on these objections, or to reduce the verdict to the amount paid by the plaintiff on account of what was then due to the building society.

In Easter term, *Hector Cameron* obtained a rule nisi on the leave reserved.

S. Richards, Q. C., showed cause. He cited *Pettman v. Keble*, 9 C. B. 701; *Pawle v. Gunn*, 4 Bing. N. C. 445; *Sutton v. Tatham*, 10 A. & E. 27; *Pollock v. Stables*, 12 Q. B. 765.

Hector Cameron, contra, insisted there was no proof of a request from the defendant to pay this money, nor was the payment made under such circumstances that the plaintiff was under compulsion of law to make it. The building society had no right to sell, and the plaintiff should not have treated the sale to Wallace as valid. He should have settled the claim of the society, for by previous dealings in this matter he fully understood defendant's liability to them. He cited *Sleigh v. Sleigh*, 5 Exch. 514; *Ward v. The Oxford &c., Railway*, 22 L. J. Ch. 908.

DRAPER, C. J.—It appears to me this case may be satisfactorily disposed of, on the ground that there was evidence sufficient to justify a finding that this money was paid by the plaintiff at the defendant's request.

The defendant was bound with his sureties under penalties amounting to £525, to make a conveyance of certain lands to Sissen as soon as the Kingston Building Society wound up its affairs, and he was obliged, in order to be in a position to relieve himself from this obligation to make good the monthly payments due on his mortgage to that society. He suffered these payments to fall twenty months in arrear,

and was made aware that his land was about to be sold for this default. He knew that subsequently it was sold, and in consequence he had communications with the plaintiff, respecting the proposition to make some arrangement with Wallace, so as to save the obligors from the consequences of a default in the condition of the bond, for the period of winding up the affairs of the building society was then close at hand, when the bond would be forfeited unless the conveyance to Sissen was made. All parties acted under the belief that (as the plaintiff had been professionally advised) the sale to Wallace was legal and binding, and that it was necessary to make an arrangement with him. In this state of things the defendant expressed his intention to raise some money (\$100) to assist in effecting that arrangement, and his regret that the others, his sureties, should have to pay so much money. I think this affords evidence that the arrangement with Wallace was made with the defendant's sanction and authority, if not expressed, certainly to be implied. In *Pettman v. Keble*, 9 C. B. 710, *Maule, J.* says: "Such authority is to be implied as much where a payment is made under a moral necessity, in consequence of its being a prudent thing to do, as where the payment is made under legal compulsion." Even if they were in error in supposing that the sale by the building society was valid, a point on which I express no opinion, the defendant himself shared the error and sanctioned the proceedings taken to redeem the land, and adopted them by his subsequent conduct.

I think, therefore, the rule should be discharged.

Per cur.—Rule discharged.

SPRY V. MUMBY ET AL.

School trustees—Warrant—Distress—Trespass—Notice of action—Limitation of time for bringing—Collector—Statute 16 Vic., ch. 180.

Held, in deference to former decisions of this court, that a school trustee who is sued for any act done in his corporate capacity is entitled to notice of action, and that the action must be brought within six months. And that a school trustee acting in the discharge of his duty as such, is entitled to the protection of, and comes within, the statute 16 Vic., ch. 180, notwithstanding he should have signed a warrant individually instead of in his corporate capacity.

Held, also, that a collector who committed a trespass while acting under a warrant issued by a competent authority was entitled to notice of action, and that the action should be brought within six months.

The declaration contained two counts, the first charging a trespass in taking away personal property. The second *qu. cl. fregit*, with an *asportavit*.

There were six defendants, George Mumby, James Mumby, Benoni Sweet, Askel Sweet, Peter Fetterly, and Simon Brownson.

Defendant George Mumby pleaded to the first count, that he, one M. B., and the plaintiff were, in 1858, the school trustees for school section No. 15, township of Rawdon, that he and M. B., being a majority of the school trustees, made a rate bill of all persons in the section rated, and of the amount payable by them, which rate bill was not payable at any future day. That defendant and M. B., being a majority, appointed Benoni Sweet collector, to collect the rate, and made a warrant, signed by them, and affixed the corporate seal of the trustee corporation thereto, and annexed the rate bill to such warrant, and delivered the same to Benoni Sweet for the collection of the rates. That plaintiff during the whole of that year was a resident within that school section, and was rated in the bill for a certain sum, for the school taxes for that year. That Benoni Sweet as collector, and after his appointment, and during the currency of his office, having first taken all the steps required by law antecedent to a levy, seized the goods in the first count mentioned by virtue of the said warrant and rate bill for the purpose of making the taxes mentioned therein, and carried away the same, which are the trespasses, &c. And defendant G. M. says that he did nothing more than is alleged to have been done by him in this plea, and that such acts

were all done by him *bona fide* in the performance by him of his duty as a school trustee as aforesaid, and all such acts were done by him more than six months before the commencement of this suit.

Defendant George Mumby pleaded a similar plea to the second count, justifying the entry of Benoni Sweet on the lands to levy the school rates, and concluding as the first plea does.

Defendant Benoni Sweet sets out the same facts in a plea to the first count, stating an application for the taxes to plaintiff, and his neglect to pay for more than fourteen days, whereupon defendant Benoni Sweet levied on the goods, &c., whereupon plaintiff replevied the said goods out of his possession, and still retains the same, which is the trespass complained of in the first count. That defendant Benoni Sweet did nothing more than is alleged to have been done by him in this plea, and that all such acts were *bona fide* done by him in the performance of his public duty as collector more than six months before the commencement of this suit.

Defendant Benoni Sweet pleaded a similar plea to the second count, raising in effect the same defence.

The other three defendants pleaded similar pleas, setting up that they were acting in aid of Benoni Sweet the collector, at his request and under his command.

D. B. Read, Q. C., for demurrer, argued that the whole defence set up by the several defendants was, that their acts came within the protection afforded to public officers under the 16 Vic., ch. 180. sec. 7, Consol. Stats. U. C., ch. 126, and that the defendants were not public officers within that act. The act applies principally to justices of the peace, though one section enacts that it shall apply for the protection of all persons for anything done in the execution of their office in all cases in which, by the provisions of any act or acts, the several statutes or parts of statutes by this act repealed would have been applicable. One ground of demurrer stated is in effect that the issuing of the warrant is an act of a corporation, not of the individual trustees, in

which case the protecting clauses do not, according to the decisions in the Queen's Bench in this province, apply though it has been held differently in this court. He cited *Brown v. Municipal Council of Sarnia*, 11 U. C. Q. B. 215; *Snook v. Town Council of Brantford*, 13 U. C. Q. B. 621; *Magrath v. Municipality of Brock*, 13 U. C. Q. B. 629; *McKenzie v. Mayor, &c., of Kingston*, 13 Q. B. U. C. 634; *Sage v. Duffy*, 11 U. C. Q. B. 30; *Municipality of London v. The G. W. Railway Company*, 17 U. C. Q. B. 266; *Croft v. Town Council of Peterborough*, 5 U. C. C. P. 141; *Reid v. Mayor, &c., of Hamilton*, 5 U. C. C. P. 269; *Barclay v. Municipality of Darlington*, 5 U. C. C. P. 432; *Helliwell v. Taylor*, 16 U. C. Q. B. 279; *Charleton v. Alway*, 11 A. & E. 993; *Bross v. Huber*, 18 U. C. Q. B. 282. He argued that the collector, being appointed *pro hac vice* only, and for a special purpose, did not come within the act—he has no public duties to perform, and those acting in his aid cannot be in a better position.

Jellett contra. In the repeal act of 14 & 15 Vic., ch. 54, public officers and other persons discharging a public duty were named. The protection to them is continued by the 16 Vic. Here the moneys were to be collected for a public use. He cited *Spry v. McKenzie*, 18 U. C. Q. B. 161.

DRAPER, C. J.—On the general question, whether a body corporate is entitled to notice of action as an individual, from the force and effect of our interpretation act, there is a conflict of opinion between the Queen's Bench and this court. I continue to entertain the views expressed by me in *Snooks v. The Council of Brantford*. Three cases have been decided in this court the other way during the time of my very learned predecessor, and I presume that we ought not to treat the question as open to discussion here. If therefore, the objection taken on demurrer, that the act of the school trustee complained of was corporate and not individual, it would seem to follow that notice would be equally necessary, and that the action must be brought within six months.

There is an apparent inconsistency on the plaintiff's part in suing the trustee as an individual, and yet objecting that the act complained of, the issuing the warrant to distrain, is a corporate act, for that I take to be meant by the words used in stating the grounds of demurrer, "did what is complained of in his corporate capacity, and was not a public officer fulfilling a public duty."

If the act be corporate, the trustee corporation should have been sued. If the defendant is, on the contrary, liable in his individual capacity, there seems no good reason why, acting as a public officer, he should not have the protection the statute affords. The 2nd and 11th sub-secs. of sec. 27, of the Common School Act, (Consol. Stat. U. C. ch. 64,) refer to this warrant. It is plainly the duty of the trustees to give the collector such a warrant signed by a majority of them, but nothing is said about its being sealed. (See 23 Vic., ch. 49, sec. 6, since passed.)

In either view, therefore, the plea appears to me to be good. In the first view, in deference to the judgments already given in this court. In the second, because I consider a school trustee acting in the discharge of his duty to be within the meaning of the 16th Vic., and even if he ought to have acted as a corporator only, i. e., to have issued a warrant in the name, and as the warrant of the school trustee corporation only, instead of signing it individually, I think he would still be entitled to the protection in accordance with the principle stated in *Bross v. Huber*, 18 U. C. Q. B. 282.

Then as to the collector, the question is not now presented, whether he is not justified by the warrant issued by a party having competent authority, but whether, assuming his liability as a trespasser, the action against him should not have been brought within six months. I think the case of *Sage v. Duffy*, 11 U. C. Q. B. 30, virtually answers the question, for the principal argument advanced by the plaintiff's counsel was, that this defendant was an officer appointed *pro hac vice*, for a special purpose. The court of Queen's Bench held that a special constable sworn in to assist an officer to whom a warrant was directed, who acted alone and made

an arrest, not having the warrant with him, was entitled to notice of action. That case appears to me even stronger than the present in this defendant's favour.

The pleas for the remaining defendants shew that they were acting in aid in the execution of this warrant. On this demurrer we must assume the fact to be so, and that they were so acting *bona fide*. In that case I think they stand on the same ground as the collector, and have the same rights in regard to this action as the collector has.

In my opinion judgment should be given for all the defendants on this demurrer.

Per cur.—Judgment for defendants.

VALENTINE DOHN V. JACOB TICE AND JAMES TICE.

Effectment—Deed of bargain and sale—Falsa demonstratio—Rejection of the incorrect portion—Description by reference to other deeds.

One S. B. by deed dated January, 1851, conveyed to W. T. 120 acres of the south part of lot 6 in the 2nd concession of Canborough describing it by metes and bounds. In March, 1855, W. T. and wife, conveyed to the defendant J. T. the southerly part of lot No. 2, in the 2nd con. of Canborough "which said southerly part was sold by S. B. to W. S."

The defendant J. T. and wife conveyed to T. H. the north 65 acres of the southerly part of No. 2, in the 2nd concession of Canborough described as follows: "Which said southerly part was sold to Wm. Tice by Samuel Birdsall, and by the said Wm. Tice conveyed to J. T. by deed, &c."

T. H. and wife conveyed to one "M." in fee 65 acres of the southerly part of lot No. 6, in the 2nd concession of Canborough, by metes and bounds, and concluding "the same being the lands originally sold by W. T. to J. T. and by J. T. to H."

M. entered into possession and demised for one year to the plaintiff Dohn, who entered and being disturbed by the defendants, brought this action to recover possession.

It was admitted there was no lot No. 2 in the 2nd concession of Canborough.

Held, the description of lot No. 2 being *falsa demonstratio*, and it appearing in evidence that Birdsall did convey the south part of lot No. 6, in the 2nd concession of Canborough, to Wm. T., and by rejecting the words "No. 2," sufficient remained to shew that 65 acres of No. 6 were conveyed, and that the plaintiff was entitled to the *postea*.

EFFECTMENT for part of lot No. 6, 2nd concession of Canborough.

By deed dated the 14th of January, 1851, Samuel Birdsall conveyed to William Tice 120 acres, composed of the south part of No. 6, 2nd concession of Canborough.

By deed dated the 6th of March, 1855, William Tice and

Jane his wife conveyed to the defendant Jacob Tice the north sixty-five acres, of the southerly part of lot No. 2, in the second concession of Canborough, which said southerly part was sold to William Tice by Samuel Birdsall.

It was admitted there is no lot No. 2 in the 2nd concession of Canborough.

By deed dated _____, the defendant Jacob Tice and Catharine his wife conveyed in fee to Thomas Hall the north sixty-five acres of the southerly part of lot No. 2, in the 2nd concession of Canborough, which said southerly part was sold to William Tice by Samuel Birdsall, and by the said William Tice conveyed to Jacob Tice by deed dated the 6th of March, 1855.

The deed from Samuel Birdsall contained a special description by metes and bounds, referring to the division line between lots Nos 6 & 7, as forming the westerly boundary of the land conveyed by him. No such description is inserted in the deeds of William Tice to Jacob Tice, or the latter to Hall.

By deed dated the 28th of June, 1860, Thomas Hall and Phœbe his wife conveyed to Mayer in fee the north 65 acres of the southerly part of lot No. 6, 2nd concession of Canborough, with a special description by metes and bounds, but not following that in the deed from Samuel Birdsall, but adding, "the same being the lands originally sold by William Tice to Jacob Tice and by Jacob Tice to Hall.

Under this deed Mayer entered into possession of the premises sought to be recovered in this action.

By deed dated the 29th of June, 1860, Mayer demised to plaintiff for one year the north sixty five acres of the southerly part of No. 6, 2nd concession Canborough, described as in the deed of the 28th of June, 1860, and plaintiff entered into possession under that lease, upon which possession defendants entered, and this action was brought to recover back the possession.

The case was argued in Easter Term.

J. Martin, for the plaintiff, cited *Shelton v. Braithwaite*,

7 M. & W. 436; Taylor on Evidence, sec. 1101, 1105; Jamieson v. McCollum, 18 U. C. Q. B. 445; Doe v. Grant, 7 U. C. Q. B. 125; Campbell v. Campbell, 14 U. C. Q. B. 17; Burgess v. Denison, 16 Q. B. U. C. 457; and Cummings v. McLachlan, 16 Q. B. U. C. 623; McDonald v. McPhail, 17 U. C. Q. B. 299.

W. Eccles argued, that in the deed of the 6th of March, 1855, under which the plaintiff professed to claim as a privy in estate, it was admitted by the terms used that Birdsall had conveyed sixty-five acres of lot No. 2, in the 2nd concession of Canborough. He insisted that the plaintiff shewed no title to any part of lot No. 6.

DRAPER, C. J.—The question briefly stated is, whether the north sixty-five acres of No. 6 passed from William Tice to Jacob Tice, and from him again to Thomas Hall, by their respective conveyances above stated. I think the plaintiff is entitled to recover. It is admitted that there is no such lot as No. 2 in the 2nd concession of Canborough, and therefore it is manifest that the description of the land conveyed, as part of lot No. 2, is *falsa demonstratio*. The only question that remains is, whether there is a sufficient description left to enable the court to say what land was intended to be conveyed by Birdsall to William Tice and by William Tice to Jacob.

Now it is in evidence that William Tice did own lands in the second concession of Canborough; that these lands consisted of 128 acres of the southerly part of lot No. 6, in that concession, and that his title to them was by a deed from Samuel Birdsall. Then, when William Tice conveyed to Jacob Tice the north sixty-five acres of the southerly part of lot No. 2, in the 2nd concession of Canborough, *which said southerly part was sold to William Tice by Samuel Birdsall*, we have two facts, one that the word "two," given as the number of the lot, is unquestionably *falsa demonstratio*, for there is no number two; and second, that Birdsall did convey the southerly part of No. 6 in the second concession of Canborough to William Tice. Suppose we read the description rejecting the words "number two," does not

enough remain aided by the evidence of the deed from Samuel Birdsall, and the absence of any pretence that Birdsall ever conveyed any other land in the second concession of Canborough, to warrant us in construing this as a conveyance of 65 acres of No. 6.

In my opinion that is the proper construction of the deed ; in *Doe Gildersleeve v. Kennedy*, 5 U. C. Q. B. 403, I examined the leading cases on this subject, and have, on several more recent occasions, had occasion to refer to them. I shall content myself with saying that in my humble judgment they fully warrant our ordering the *postea* to be given to the plaintiff.

Per cur.—*Postea* to plaintiff.

DAVIS V. LEVEY ET AL.

Interpleader—Married woman—Judgment recovered against by her maiden name not absolutely null and void.

A. having obtained possession of certain goods and chattels by bill of sale from a sheriff upon an execution issued on a judgment recovered against a married woman without joining her husband. B. having recovered a judgment and issued an execution in the same way (without joining the husband) contended in an interpleader that A's judgment was null and void, and that he was entitled to the goods.

Held, that A's judgment not being absolutely null and void, and he being in possession with a *prima facie* title, he was entitled to raise the same objection to B.'s judgment, and that both judgments being open to the same objections, he was entitled to prevail.

APPEAL from the County Court of the United Counties of York and Peel.

This was an interpleader brought in the county court to try if the right to certain goods seized in execution by the sheriff of the said United Counties of York and Peel under a writ of *fiery facias*, issued out of the said county court directed to the said sheriff for the having the execution of a judgment in the said court recovered by Lawrence Levey and Samuel Levey in an action at their suit against one Mary A. Sickles, were, or some part thereof was, at the time of the delivery of the said writ to the sheriff the property of the said Isaac Davis as against the said Lawrence Levey and Samuel Levey.

The case was twice tried, when the following evidence was taken material to this decision :

The execution on the judgment in the case of Davis v. Armstrong and the bill of sale from the sheriff to Davis put in.

John Douglass for plaintiff.—I am a sheriff's bailiff; I seized the goods in question in Peter Street, on the 9th of June, 1859; I again seized the same goods on the 6th of August, 1860, in the suit in which the interpleader order was granted at Davis' own place.

Cross-examined.—At the time of the first seizure I think M. A. Armstrong was married to Sickles; he was living in the house with her; at the second seizure I think the plaintiff had not long had the goods; the goods had remained in Armstrong's possession from the time of the first seizure to within two or three days before the time of the second seizure.

Proved deed from sheriff dated the 28th of June, 1859. I made a valuation of the goods mentioned in the schedule; they are the same articles as those claimed; I seized in the suit of Davis v. Armstrong.

Cross-examined.—When the goods were valued they were left in Armstrong's possession by Davis' instructions; I seized in the suit of Levy v. Sickles while they were in Davis' possession, who had then had them a day or two; Armstrong was in town when the seizure was made.

Henry Skinner for plaintiff.—Produced the writ of *fi. fa.* in suit of Davis v. Armstrong; the bill of sale produced is of the goods seized; the sheriff's fees were paid in cash by Davis, and receipts given on execution; also division court execution and claim for rent paid by Davis to the landlord; the balance was £11 4s. 2d.

Cross-examined.—The landlord made no claim to us; there was a former execution at the suit of Levey, which we returned *nulla bona*; shortly after the bill of sale on the 10th of July, 1860, it was renewed by *alias fi. fa.* on which the seizure was made.

Commission and evidence of Mary Ann Sickles read.

Mr. Cameron objected to the evidence being read against

the judgment. Objection being overruled, the following is a copy of the interrogatories administered to Mary A. Sickles as a witness for the defendants, and the answers thereto, as far as they relate to this decision :

What is your present name, and are you legally married to Henry Sickles your present reputed husband, and if so, when, where, and by whom were you so married ?

My name is Mary Ann Sickles, and I was legally married to Henry Sickles on the 14th of February, 1859, at Toronto, in the Reverend Doctor Lett's house, and by him.

Were you indebted to Isaac Davis the plaintiff in this cause in any sum of money, and if so, how much at the time he sued you and obtained a judgment against you through James Boyd Davis as his attorney ?

I was not indebted in any sum of money whatever.

Copy of interrogatories administered by way of cross-examination :

Before your alleged marriage with the said Henry Sickles, was not your real name Mary Ann Armstrong, and were you not known and called by that name in Toronto and elsewhere ? Were you not called Mary Ann Armstrong in all legal proceedings ; since your alleged marriage with said Sickles have you co-habited with him, and for how long ; as your husband did he ever control or assert any control over your property, and have you not since your alleged marriage still continued to be known by the name of Mary Ann Armstrong.

I was called Mary Ann Armstrong, but that was not my real name ; I was so known and called in Toronto and elsewhere, and was so called in all legal proceedings ; I have cohabited with my said husband since our marriage ; we are still living together as man and wife ; he did not and has not asserted any control over my property, and I am still known by the name of Mary Ann Armstrong.

Were you not at the time the plaintiff in this cause so sued you and obtained judgment against you, indebted to the said plaintiff in the sum of three hundred and twenty-four dollars, or in any and what other sum ?

I was not indebted to the plaintiff at the time in any sum of money.

How long did you occupy the said house on Peter street, and at what rent.

I was not quite two years in the said house, and the rent was seventy-five pounds per year.

J. B. Davis for defendant.—I am attorney for Davis; Armstrong came to my office to be served by me, and I then served her.

Mr. H. Cameron objected on two points of law, first, that the judgment was entered for an amount beyond the jurisdiction of the county court. Second that the judgment was entered against Armstrong as a single woman when she was a married woman.

Stephen Lett for defendant.—I produce the marriage certificate between Harry Sickles and Mary Ann McMullens; they were married on the 14th of February, 1859; the woman lived in a house on the corner of Peter and Adelaide streets, opposite to Mr. Perkins' house.

Cross-examined.—After marriage I saw them go to that house.

Victoria Howard for defendant.—I lived with Mrs. Armstrong, corner of Peter and Adelaide streets; she was married to Sickles on the 14th of February, 1859; I took down a list of things in the house; she paid the rent the last time to Brooke; when Davis took the things away she was absent at Montreal; I was left in care of the house; early in the morning, about 5 a. m., Davis got in at the back window; about two months before he took the things Davis said in my presence that she owed him five pounds; she said fifteen dollars; this was on a transaction of Bradboes.

Cross-examined.—This was the only conversation I ever heard about money; the goods were given up to Davis against my consent; Sickles was there; Mrs. Armstrong told me she had given property to Davis to keep it from her creditors.

Henry Skynner for defendant.—I received first writ in the case of Levey et al. v. Sickles, on the 24th of August, 1859, and an alias on the 10th of July, 1860; the first writ was returned *nulla bona*, and Davis paid the costs, and he produced receipts for rent, and a division court suit.

James B. Davis for defendant.—I was the attorney for *Davis* in the case of *Davis v. Armstrong*; the defendant was served by me personally at my office; the action was for ninety pounds; the judgment was entered as soon as possible after the service of the writ.

Mr. *Cameron* proposed to ask if *Armstrong* made statements as to indebtedness after the judgment was obtained. Objected to, and overruled.

Mr. *Cameron* objected that judgment, execution, and bill of sale were void because *Armstrong* was a married woman.

Verdict for plaintiff with leave to defendant to move to enter a verdict for defendants.

A rule nisi for a new trial having been obtained and the case argued, the learned judge discharged the same, against which decision this appeal was made on the ground that the judgment and the bill of sale on which the plaintiffs' judgment is founded was null and void, being recovered against a married woman by her maiden name.

The case was argued by *H. Cameron* for plaintiff, citing: *Grant v. Wilson*, 17 U. C. Q. B. 147; *Green v. Stevens*, 2 H. & N. 146.

McMichael, contra, cited *Edwards v. English*, 7 E. & B. 564.

DRAPER, C. J.—It appears that the defendants in this interpleader had an execution against *Mary Ann Sickles*, on which on the 18th of July, 1860, the sheriff seized the goods in question out of the possession of the plaintiff *Mary Ann Sickles*, formerly *Mary Ann Armstrong*, according to the evidence, was married on the 14th of February, 1859, and her husband is still living.

The plaintiff's title was under a bill of sale from the sheriff dated the 28th of June, 1859, but when plaintiff obtained his judgment against *Mary Ann Armstrong* is not stated. Possibly it was after she was married to *Sickles*, for it seems the proceedings in the suit, *Davis v. Armstrong*, were carried on as fast as possible, and with a view to the

issuing an execution against the goods of Mary Ann Armstrong or Sickles in order that Davis might obtain a title thereto. He obtained possession under the bill of sale, and two or three days afterwards the sheriff seized the goods on the *alias fi. fa.* issued by the defendants. The only question submitted to the jury was, whether the plaintiff's judgment and the sale in execution thereunder by bill of sale, was a *bona fide* transaction or fraudulent pretence, there being no debt actually due, in order to defeat creditors. The jury found for the plaintiff.

The defendants objected that the judgment and execution on which this bill of sale to the plaintiff was made was null and void, being recovered against a married woman sued by her maiden name without her husband being joined as a defendant. Leave was reserved to move to enter a verdict for the defendants on this objection.

A motion was made accordingly in the following term and a rule *nisi* granted, with an alternative, for a new trial on the evidence, which after argument was discharged, and it is this decision which is appealed from.

It escaped notice that there were no reasons of appeal assigned, or we should not have allowed the case to be argued. As my opinion is for dismissing the appeal with costs, it is now of little importance that this objection was overlooked.

As to the motion for a new trial, the learned judge of the county court seems satisfied with the verdict, by his declining to set it aside. There was no complaint of misdirection, and the evidence was sufficient if believed, to sustain the finding. On this ground we should not interfere.

It is true that the claimant has thrown on him the *onus probandi*, when he sets up title to goods seized by the sheriff on execution. But possession is *prima facie* evidence of title, and the plaintiff shewed that and shewed a bill of sale, given by the sheriff of these very goods when taken in execution against the same person against whose goods the defendants had issued their execution. To this bill of sale the defendants answer, Mary Ann Armstrong, against whom you (the plaintiff) recovered judgment and issued the execution, which is the foundation of your bill of sale, was married to

Harry Sickles, when you brought your action against her and recovered judgment, and her husband is still living, therefore your judgment is void and the bill of sale nugatory. May not the plaintiff with equal force reply, you the defendants have sued the same Mary Anne since her marriage and have recovered judgment against her, without joining her husband. Your judgment and execution must be equally void. In this respect each parties case is alike.

The case of *Dick v. Tolhausen* 4 H. & N. 695, shews that where a judgment is recovered in a court of record against a woman who was covert when that action was brought, and thence until the judgment, and her husband was no party to any portion of the proceedings, she and her husband may bring error, but cannot plead this matter as a defence when they are both sued upon the judgment. That does not strictly apply to this case, though it shews that a judgment so recovered is not *absolutely* null and void.

Here the plaintiff, being in possession of the goods, and as we must assume on the verdict, being a purchaser for value, has a right to contest the title of the defendants to interfere with his possession, and if the objection urged by the defendants be valid as against his judgment, it must be equally valid against theirs, and then as against them he shews a right to hold the goods.

I think the appeal should be dismissed.

Per cur.—Appeal dismissed.

GILDERSLEEVE V. HAMILTON.

Immediate execution—County courts—Power of judge of to certify for—
23 Vic. ch 42, sec. 4.

Held, that in a case pending in one of the superior courts, and taken down for trial to county court under 23 Vic., ch. 42, sec. 4, the judge of the court below has power to order immediate execution to issue.

This was an action pending in this court and taken down to trial at the county court of Frontenac, Lennox, and Addington, under sec. 4, of ch. 42, 23 Vic. On application of the plaintiff, the learned judge certified for immediate execu-

tion, and judgment was entered accordingly and *fi. fa.* issued.

W. H. Burns, for defendant, moved to set aside the judgment and execution, on the ground that the judge below had no power to grant any such certificate—that the statute authorising such trial before him provided that judgment might be entered on the fifth day after the verdict was rendered, unless the judge should certify that the case should stand for motion in the court in which it was brought, in which case no judgment should be entered until the fifth day of the term.

Kingsmill shewed cause.

HAGARTY J.—Sec. 239 of the Common Law Procedure Act, declares that “the judge before whom any issue joined in any such action, or before whom damages are assessed, may certify under his hand at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith,” &c.

The county court judge who tried this case under the act of 1860, is certainly in terms within the words just before cited, as the judge before whom the issue is tried or damages assessed, and unless there be something in the act of 1860 to the contrary, I can see no grounds for doubting his power.

The defendant's argument rests chiefly on the direction that judgment may be entered on the fifth day after verdict rendered, and that this provision necessarily excludes the idea that the judge had the power to certify for earlier execution.

A much more formidable difficulty was surmounted by our Court of Queen's Bench in *Paterson v. Hall*, 11 U. C. Q. B. 358, when the county court judge exercised a similar power on a writ of trial under 8 Vic. ch. 13, sec 51, although it was directed by sec. 53, that at the expiration of six days from filing of the writ of trial in the Crown office, judgment might be signed and execution issued: the court held that notwithstanding these provisions the county court judge had such power on a fair construction of the 16 Vic. ch. 175,

sec. 27, which declares that in all actions in superior courts or county courts, the judge may so certify.

The same view was taken by the Court of Common-pleas in *McKay v. Hall*, 4 C. P., 145, and the judgment of *Macaulay, C. J.*, is express on the point.

If these cases were rightly decided, and I see no reason to doubt, the power to certify in the case before us, is, I think clear.

Rule discharged.

DRAPER, C. J., took no part in this judgment.

ALLNUTT V. RYLAND.

Debt—Mortgage—Execution of as security—Not open to grantor to deny indebtedness.

Defendant being indebted to plaintiff for a sum of money; by an indenture reciting his indebtedness, and that he had agreed with plaintiff for the re-payment of the said sum due within 6 months from date with interest, conveyed to plaintiff certain lands *habendum* in fee. Proviso, that plaintiff, if debt was duly paid would re-convey, but there was no covenant in the indenture for re-payment by defendant; endorsed on the indenture was a deed poll executed by plaintiff stating the said debt thereby secured to be the proper money of one J. L., and that the plaintiff's name was only introduced therein as agent for the said J. L., and in consideration of the trust, and of 5s., absolutely assigned all interest in the lands in the said indenture as well as the indenture to the said J. L. On motion to set aside nonsuit, *held* that it was not open to defendant to deny that he was at the date of the said indenture indebted to the said plaintiff.

The declaration was for money lent by plaintiff to defendant, for money paid by plaintiff for defendant, for interest, and on an account stated. The defendant pleaded—1st, never indebted. 2nd, payment. 3rd, that the causes of action did not accrue within six years before the suit. 4th, accord and satisfaction by delivery and acceptance of an indenture whereby defendant granted, conveyed and assured to plaintiff certain lands. Issue on the first, second and fourth pleas, and replication to the third; that when the cause of action accrued plaintiff was, and from thence hitherto has been, and still is beyond the seas, within the meaning of the statute in that behalf.

The issues were tried before *McLean, J.*, in April last, at Kingston. The plaintiff proved and put in an indenture dated the 22nd of May, 1849, from defendant to plaintiff re-

citing that defendant was indebted to plaintiff in £136 11s. sterling, and that defendant had agreed with plaintiff for the re-payment of the said sum in six months from the date with interest, by which the defendant in consideration of the debt granted, &c., to plaintiff certain lands in Lower Canada, *habendum* in fee. Provided that if defendant paid the said sum with interest at 5 per cent. to plaintiff at the expiration of the time agreed upon, plaintiff should re-convey to defendant; with a power of sale on default. But there was no covenant for payment by the defendant. On this deed appeared endorsed a deed poll purporting to be executed by plaintiff, (the date left in blank,) by which the plaintiff declared the debt of £136 11s. to be the proper money of one John Lane, and that plaintiff's name was only introduced into the mortgage as agent and trustee for him, and plaintiff in consideration of 5s., and in discharge of the trust, granted and assigned to Lane, all the estate, right, title, interest, use, trust, benefit, claim and demand which plaintiff had or might claim to the said lands or to any matter or thing in the indenture mentioned or contained, so that neither he nor his heirs, executors, administrators or assigns could claim any interest, benefit trust or privilege in the premises but therefrom, and from all actions concerning the same might be debarred. No evidence as to this endorsement was given.

For the defendant it was objected that on this evidence it appeared the debt was contracted by defendant to Lane, and that it could not be sued or any remedy had for the recovery thereof in plaintiff's name as a simple contract debt. By consent a non-suit was entered with leave reserved to plaintiff to move to enter a verdict for him for £265 15s. 9d., if the court should consider him entitled to recover, and "defendant does not shew payment by affidavit on the application to set aside the nonsuit."

In Easter Term *A. S. Kirkpatrick* obtained a rule *nisi* accordingly.

Henderson (of Kingston) shewed cause. He referred to *Seddon v. Senate*, 13 Ea. 63; *Courtney v. Taylor*, 6 M. & Gr. 851; *Yates v. Aston*, 4 Q. B. 182.

DRAPER, C. J.—I think it was not open to the defendant to deny that he was indebted to the plaintiff on the 22nd May, 1849, in the sum of £136 11s. sterling. The deed of that date is plainly a mortgage to secure payment of that sum with interest at 5 per cent. after six months, and would operate to prevent proceedings for the recovery of the debt until the expiration of that time. On the face of this mortgage there is an unequivocal acknowledgment of a preceding debt and the term "re-payment," which is used, warrants our treating the admission as referring to a loan, though the language is not express.

The case cited of *Yates v. Aston* appears to me therefore to be distinctly applicable, and to decide that this mortgage deed operates only to give the plaintiff a security for re-payment without merging the original debt. The contract for re-payment, whether express or implied, from the acknowledged previous indebtedness remains unaffected, and on that contract this action is maintainable.

Yates v. Aston is recognised as a binding authority in *Mathew v. Blackmore*, 1 H. & N. 762, and the decision in that case proceeds on the ground, that a contract by parol for re-payment cannot be implied where there is an express covenant under seal relating to it. In the principal case there is no such covenant, and therefore I think *Yates v. Aston* must govern.

I do not think the case of *Courtney v. Taylor*, 6 M. & G. 851, cited by Mr. Henderson, affects this conclusion. It is certainly said there that where in a deed a party unequivocally "admits himself to be liable to pay money, a covenant that he will pay it may be implied," but it is added, "if the recital had been that the money was due on a parol security, no such covenant would have been implied as would have the effect of merging the parol security. Where there is a liability the origin of which is shewn, there is no necessity for implying a covenant." Here there was an admitted liability on which the law would raise a promise, and no necessity exists therefore for implying a covenant.

As to the second point. The deed poll amounts to a declaration of trust, binding the plaintiff as between him-

self and Lane, but not affecting the relation between the plaintiff and the defendant. For all we see this action is brought for Lano's benefit and by his authority. If necessary we may infer this. But there is no plea which raises the question, that by force of the deed poll and the assignment therein the plaintiff is precluded from suing the defendant, if indeed this as a mere *chose in action* was assignable.

As to the shewing payment by affidavit, I have referred to *McLean, J.* and he informs me that the defendant had leave to give upon affidavit any evidence that would have been receivable at *nisi prius* to show that the debt to Lane was actually paid, if that matter had been then in issue. The defendant has not offered such proof, but has simply filed his own affidavit.

We think therefore the rule should be absolute to enter a verdict for plaintiff for £265 15. 9d.

Per cur.—Rule absolute.

POWELL V. BANK OF UPPER CANADA.

Chattel mortgage—Description of goods covered thereby—Stat. 20 Vic., ch. 5, sec. 4.

The property covered by a chattel mortgage was described as, "The goods, chattels, furniture, and household stuff expressed in the schedule *hereunto* annexed," which schedule was headed, "An inventory of goods and chattels in the possession of one J. R., on a certain day. It proceeded to mention certain rooms and the articles therein contained—then jewellery, blankets, household linen, silver, &c., &c.,—the locality of the house in which the goods, &c., were contained not being mentioned.

Held, a sufficient description of the goods and chattels intended to be covered by the mortgage under the authority of previously decided cases referred to in the judgment of the court.

INTERPLEADER ISSUE to try whether certain goods seized on the 29th November, 1860, by the sheriff of York and Peel under a *fi. fa.* issued by the defendants against one John Ridout, were the property of the plaintiff as against the defendants.

The issue was tried at Niagara, in May, 1861, before *Richards, J.* The only point taken at the trial was whether certain goods and chattels, were sufficiently described in a chattel mortgage made by the execution debtor to the plaintiff. The chattel mortgage purported to grant, bargain, sell, and assign, the goods, chattels, furniture, and household

stuff expressed in the schedule thereto annexed. The schedule was headed inventory of goods and chattels in the possession of John Ridout, 7th July, 1860, referred to in the bill of sale by way of mortgage. It proceeded thus—"Drawing-room," and then followed a list of articles. Next "dining-room," and a like list, and so on, naming various rooms, and giving a list of furniture and articles in each. Then came "jewellery," 1 set pearl, 3 gold chains, 10 jewelled rings, 1 pair gold hairpins, 10 bracelets, gold, agate, and jet; 8 bracelets, do, do; 3 gold locketts, 1 silver buckle, 1 blue opaque set, 1 gold pencil, 1 pair gold cuff pins, 2 gold seals, 1 bunch gold charms, 2 silver pencils, 1 pair of silver tweezers, 1 gold and 2 silver watches." Then came a list of blankets and counterpanes and of household linen, and then "silver—18 dinner forks, 1 child's spoon and fork, 6 table spoons, 18 teado, sugar tongs, mustard and cayenne spoons, soup ladle, child's cup and 4 salt spoons." Other articles were similarly enumerated.

The defendants' counsel contended that of these articles of jewellery, blankets, and counterpanes, silver, &c., there was no sufficient description. They were not mentioned to be in any of the rooms, nor was any specific description of them given.

Leave was reserved to defendants to move to enter a verdict as to these articles; and on other questions connected with the *bona fides*, and legal sufficiency of the transaction, the plaintiff had a verdict.

In Easter Term *W. Eccles* obtained a rule *nisi*, to enter a verdict for defendant, as to these articles which were not described as being in any room or place, on the ground that such articles were not sufficiently and fully described as required by the statute in that behalf, the said goods being under the heads of jewellery, blankets and counterpanes, household linen, silver, electro and plated ware, cutlery, china, glass, earthenware, library [which was thus set forth in the schedule, "Library—133 volumes of standard literature, 211 vols. miscellaneous novels, magazines, &c., 53 English school books, 16 Latin do., 14 Greek do., 21 French,

7 Italian and 6 German, do., 7 bibles, 4 prayer books." The rule was also in the alternative for a new trial on the same ground.

Hurd shewed cause; he argued that the description was as particular as the nature of the articles admitted; that such things as jewellery, silver plated goods, &c., had no *habitat*. They were moved and carried about as convenience and the necessity for using them dictated—now here, now there. To describe such things as in any particular room or place, would be either to mislead or to lay the foundation for an objection to the truth of the description, as they might not be found in such place at any particular time. That the word "library" might mean the room in which books were kept, as well as the collection of books.

W. Eccles repeated his objection to the generality of the description as not complying with the statute.

No cases were referred to on either side.

DRAPER, C. J.—In almost every case that arises under the chattel mortgage registration act, Consol. Stat. U. C., ch. 45, where the proper construction of the sixth section is in question, we find difficulties and doubts which might have been obviated, or materially diminished, if somewhat more pains and consideration had been applied to the framing the instrument.

In the present case, a direct statement, that the goods, furniture, &c., in the dwelling house of the assignor, or in any other named house, is omitted. And excepting that the assignor is described as "of the city of Toronto" the locality of the apartments in which a very considerable part of the furniture, &c., are specified in the schedule, to be, is left undefined. Printed forms seem to be hastily filled up, and a litigation both protracted and expensive is the frequent result.

The section in question is very short. "All the instruments mentioned in this act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished."

In one of the first cases, in which it was considered, *Robinson, C. J.*, said, "I do not find it easy to understand how a stock of goods in a shop, or furniture in a dwelling house, are to be otherwise described than by stating the shop, warehouse, or dwelling in which the goods or furniture respectively are at the time of the assignment," unless by taking a minute list of every article, and the court there held that goods not particularly described by locality or otherwise, would not pass under the words "all other personal estate whatsoever and wheresoever." *Harris v. Commercial Bank*, 16 Q. B. U. C. 437.

In *Wilson v. Kerr*, 17 U. C. Q. B. 168, the description was "all and singular the stock in trade" of the assignor, "situate on Ontario street in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle." The court held this an insufficient description, and the decision was affirmed in the court of appeal, 18 U. C. Q. B. 470, where it was held that there being no list or schedule of the stock in trade, the premises, wherein it was to be found, should be designated with greater certainty, and as to the "other goods," there was no description whatever of them, except that they were "his," the assignor's.

Kingston v. Chapman, 9 U. C. C. P., 130, was rather negative than affirmative on the question, the court refusing to pronounce that "under all circumstances, the merely describing chattels as those which were in a named building, was an efficient and full description."

Fraser v. The Bank of Toronto, 19 U. C. Q. B. 381, comes nearer to the present case. The assignment was of all the goods, chattels, and household stuff, particularly mentioned and set forth in the schedules B. C. and D. annexed to the mortgage. Schedule C. was headed "household furniture in Exter Walsh's residence." Schedule D. was headed "household furniture and property of J. R. McDermot," but the articles enumerated in these schedules were not described in any manner that could enable a person to distinguish them from other articles of the same kind, though they were specified as so many chairs, a piano, a sofa, &c. As in this

case the locality of the house was not specified. No house was directly mentioned, but the furniture was described as in the residence of Exter Walsh, and the court held that the use of the words "household furniture" as to McDermot, warranted the assumption that the schedule referred to his dwelling house, as it referred to and specified the several apartments in which such furniture was.

In our case no objection is taken as to any of the furniture, &c., scheduled as being in a particular apartment, and the case of *Fraser v. The Bank of Toronto*, seems to warrant our holding that as the goods, &c., are described in the deed as the goods and chattels, furniture and household stuff, "expressed in the schedule hereunto annexed," whatever is specified in the schedules, and can be properly deemed to come within the definition of furniture and household stuff, will pass to the plaintiff.

As to the books, we may treat the word "library," as descriptive either of the collection of books, or of the apartment in which they are contained. In Johnson's dictionary the former definition is alone given. In later authorities, among them the imperial dictionary, both senses are given to the word, and it is, I think, at the present day commonly used and understood in both senses.

Then as appears to me "blankets and counterpanes," "household linen," "silver," "electro and plated ware," "cutlery," "china," "glass," and "earthenware," as heads, under each of which are detailed articles of the several descriptions, may be properly treated as coming within the general terms, "furniture and household stuff," used in the deed of assignment, all of them being described in the schedule as in the possession of the execution debtor.

There remains the things specified under the general head "jewellery." There is a list, with a descriptive statement of material or of the nature of the article or of the object for which it is designed, conceived in general terms, and yet particular enough to facilitate identification. I cannot say the description would enable a stranger positively and certainly to identify each article, but nevertheless coupled with the allegation that they were the property of the

execution debtor, and were in his possession, and have been levied upon in his possession under the *fi. fa.*, I am not prepared to hold it an inefficient description, so as to make the assignment as to those things of no effect. Some weight is due to the finding of the jury that the assignment was made in good faith and upon sufficient consideration.

On the whole, I am of opinion the rule must be discharged.

RICHARDS, J.—I only concur in this judgment as carrying out the views of the Court of Queen's Bench in the case referred to, conceiving it better to follow the principles laid down in that decision, than to dissent from them until the question is settled in appeal.

HAGARTY, J.—If this case were the first case under the statute I should at once decide that the jewellery at all events, if not the rest of the chattels, were insufficiently described; but after the decisions that have taken place, I agree with the learned Chief Justice that we can hardly hold the present description insufficient. I cannot see how we can hold it to be less in accordance with the statute than that of the "household furniture," in *Fraser v. Bank of Toronto*.

I decide in the plaintiff's favour wholly on the decided cases, not from my own reading of the statute.

Per cur.—Rule discharged.

ABBOTT (PLAINTIFF) APPELLANT V. SKINNER ET AL. (DEFENDANTS) RESPONDENTS.

Submission—Award—Action in debt on—Plea of nunquam indebitatus.

The parties to this suit executed a submission agreeing to leave to the arbitrament of certain persons the matters in difference between the parties, stating in the alternative what the arbitrators were by their award to direct, either, that the defendants should at a short period deliver up the premises, or that a lease should be executed between the parties embodying certain stipulations in the submission set forth; under which the arbitrators awarded that a lease should be executed, and proceeded to direct that should it be deemed necessary for the mutual benefit of the parties, that during the term certain work should be done, the said defendants should pay one-fifth part of the expenses thereof, not stating in terms that this should be a stipulation contained in the lease.

The plaintiff having performed certain works upon the premises for the mutual benefit of himself and the defendant brought debt on the award to recover one-fifth part of the expenses incurred thereby, to which the defendants pleaded never indebted

Held, that the plea of *nunquam indebitatus*, put in submission in issue. That the arbitrators exceeded their power in ordering defendants to pay &c. They should, according to the submission, have directed a lease to be executed between the parties containing a stipulation to that effect.

APPEAL from the County Court of the United Counties of Frontenac, Lennox and Addington.

Declaration upon an award made by three arbitrators under and by virtue of a submission made by plaintiff and defendants to the said arbitrators, by virtue of which they awarded, among other things, that defendants should pay plaintiffs one-fifth of all expenses that might by him, the said plaintiff, be necessarily incurred after the 1st of October, then next ensuing, (A. D. 1860,) for the mutual benefit of plaintiff, and defendants in renewing and repairing water wheel, flume, &c., and they further awarded that should it be deemed necessary for the mutual benefit of plaintiff and defendants to put in a new wheel, flume, &c., or any of them, before the 1st of October next thereafter, then defendants should pay one-fifth of the expenses incurred, upon an account for the same being rendered and vouched for.

Averment, that certain work was deemed necessary and was performed by plaintiff costing the sum of \$893²⁴/₁₀₀, and the plaintiff claimed \$178⁴⁸/₁₀₀.

Plea.—Never indebted.

The case was tried at the sittings of the county court in

March last, when a verdict was taken for plaintiff, with leave to defendants to move to enter a nonsuit, if the court should be of opinion the plaintiff could not maintain his action.

In term, after the sitting a nonsuit was moved for on the following, among other grounds, 1st, that the submission did not support the award in reference to the present cause of action as set out in the declaration; in this, that the submission gave the arbitrators power to direct that a lease should be made between the parties, to define the condition and stipulations of the lease, and set forth in the lease what each party would be bound to do in the use and occupation of the premises, and therefore, that no cause of action like the present could arise out of the award itself directly, without the intervention of a lease.

2nd, that the action, if any, should be upon a lease made in pursuance of the award, the submission itself not authorising the making of an award to order work like that for which this action was brought, though it may authorize an award directing such a stipulation to be inserted in a lease.

The following is the judgment of the learned judge of the county court:

The general issue of *nunquam indebitati*, pleaded by the defendants, in my opinion puts in issue the submission to arbitration, the enlargement of the time and the making of an award according to the submission; in other words an award, within the terms of the submission mentioned in the declaration, is requisite to sustain the present action under that plea. I would refer to the case of *Hodgson v. The Municipality of Whitby*, 17 U. C. Q. B. 230, and to *Bullen and Leakes*, precedents 268, (note a,) in support of this view of the law. There is in reality but one question for the court to decide. Have the arbitrators exceeded their authority in ordering the defendants to pay one fifth of the expenses incurred by the plaintiff in the putting in of the new wheel, flume, and bulk-head, as mentioned in the declaration, directly, without the interposition of a lease. To arrive at a correct understanding of the matter, such portions of the

submission as relate to the subject matter of the present action must be examined. It is recited in the submission: whereas disputes have arisen between the parties as to the amount of rent the defendants shall pay to the plaintiff for the time they have occupied, (a part of certain premises in the village of Gananoque,) and to their right to receive from the plaintiff a lease of the premises they, the defendants, so occupied, and as to the terms of the said lease it is desirable to refer the same to arbitration as after mentioned, and whereas it is desirable, and has been mutually agreed between the parties to submit to the decision and arbitrament of the said arbitrators, all other matters in dispute between them, it is hereby agreed that they, the said arbitrators, shall decide by whom the costs which have been incurred in the Court of Chancery and the division court shall be paid. They shall also further determine the claims of the plaintiff with a contra account of defendants now pending in the division court, and shall also award what amount, if any, shall be paid by the plaintiff to the defendants in pursuance of their bill of items hereunto annexed, the foregoing, together with the first named matter of dispute, as to a lease being all matters in dispute between them. After a clause in the submission agreeing to refer the matters in dispute to David Ford Jones, Isaac Briggs, and Robert Brough, or any two of them, follows the agreement bearing principally on the present action, that is to say: and it is hereby further agreed that the said arbitrators, or any two of them, may, if they think proper by their said award, direct that the occupation by the defendants of the premises shall, at some short period thereafter, cease and determine, and that the same shall be delivered up by the defendants to the plaintiff in good order and condition, or that the plaintiff shall execute and deliver to the defendants, or the survivors of them, etc., a lease of a part of the said premises, and they, or any two of them, shall, by their said award, direct who is to prepare the said lease and within what time it is to be executed and delivered, what rent shall be reserved thereby, and the time of payment of the same, and the duration of the said lease, (not to exceed, however, thirteen years,) also what part of the

said premises, including the use of the water wheel thereon, shall be demised thereby and the extent of the use of the said water wheel by the said contemplated lessees, and the manner the same may be used, and such other regulations and stipulations as they, or any two of them, may think proper, so as to prevent dispute afterwards arising as to the parts of the premises the lessees are to occupy, and the manner of using the water wheel and the machinery of the parties respectively, and what other stipulations or covenants they, or any two of them, may think proper, and also what shall otherwise be done by either of the parties respecting the matters in difference. Mr. Britton has argued the case for the plaintiff with much point and intelligence in favor of the integrity of the award. He has contended that the words, "what shall otherwise be done by either party respecting the matters in difference," are sufficiently comprehensive to embrace the groundwork of the present action as set out in the award and its immediate subject matter as disclosed in the declaration. The matters which were referred to the arbitrators were the matters in dispute between the parties at the time of the submission, which are specified with clearness and precision in the submission itself. It is declared in the submission that the matters in dispute are about the payment of certain costs incurred in the Court of Chancery and in the division court, a claim pending in the division court, and about a certain bill of items attached to the submission, together with the first named matter of dispute as to a lease, being all matters in dispute between the said parties; the first named matters of dispute as to a lease are particularized in the submission as follows: "Whereas the defendants entered into possession of part of said premises under the plaintiff, and have put up certain machinery thereon, which has been worked by the water wheel on said premises, under the promise as they allege of obtaining from the said plaintiff a lease of part of the said premises and privileges for thirteen years from the first day of October, 1857, and whereas disputes have arisen between the parties as to the amount of rent the defendants should pay to the plaintiff for the time they have so occupied a part of the said

premises, and to their right to receive from the plaintiff a lease of the premises they have so occupied for the period of thirteen years, and as to the terms of the said lease." It certainly does not appear by the submission that there was any dispute between the parties in reference to the renewing or repairing of the water wheel, flume, and bulk-head, or as to the proportion of the expenses to be paid by each party for putting in a new wheel, flume and bulk-head, independent of the dispute about the lease and the terms of it. The dispute between the parties over and above the costs in chancery and division court, and the account and bill of items is restricted to the amount of rent to be paid by the defendants to the plaintiff for the time they had occupied the premises, their right to receive from the plaintiff a lease of the premises for thirteen years, and the terms of the lease. The submission then gives the arbitrators power to direct who is to prepare the lease, within what time it shall be executed, what rent shall be reserved, its duration, what part of the premises should be demised to the defendants, including the use of the water-wheel and the extent of that use, and the manner in which it might be used, and such other regulations and stipulations as the arbitrators should think proper, so as to prevent disputes afterwards arising. As the matter of putting in a new wheel, flume and bulkhead, and proportion of the expenses which should be paid by each party in the event of their being put in, was not referred to the arbitrators by the submission as a substantive dispute, over and above the dispute concerning the giving of the lease and the terms of it, they had no right to make a substantive order in their award touching the same, or touching the work for which the present action is brought; or to give any independent direction out of the lease concerning the proportion of the expenses to be paid by each of the parties as they have done, according to the award set out in the declaration. The submission does not support the award in respect to the presentation as set forth in the declaration. The interposition of a lease is necessary before the defendants can become liable on a cause of action like the present under the submission. The arbitrators according to the terms of the submission, I appre-

hend, could direct and order a clause or stipulation to be inserted in a lease to be made in pursuance of their award, ordering the work upon which the alleged cause of action disclosed in the declaration is founded, but they had no authority, so far as I can see, to order or direct it out of the lease, as a matter independent of, and beside the lease, as they have done, according to the award declared upon. The submission contemplated that, in the event of the arbitrators ordering a lease to be executed between the parties in pursuance of the submission, they should order and direct covenants, stipulations and regulations to be inserted, and which would cover every matter in difference, and every matter which might become a source of dispute between the parties thereafter during their joint occupation of the premises, so as to prevent disputes afterwards arising between them as to the occupation of the premises and the manner of using and regulating the water-wheel and the machinery during the term. Instead of directing such covenants, stipulations and regulations to be inserted in a lease, the arbitrators have by their award as set out in the declaration assumed the right to authorise the plaintiff if he thought proper so to do, to put in a new wheel, flume and bulkhead, and to order the defendants to pay one-fifth of the expenses which might be incurred in putting in the same, independent of any lease, and beside it. The award set out in the declaration is not warranted in my opinion by the submission produced at the trial. Under that submission an action like the present cannot be maintained without the intervention of a lease made and executed in pursuance of an award founded on the submission. The rule for entering a nonsuit therefore must be made absolute.

Per cur.—Rule absolute to enter a nonsuit.

Certified to her Majesty's Court of Common pleas at Toronto, under my hand at the city of Kingston, this 16th day of May, 1861.

K. MACKENZIE,

Judge C. C. F. L. & A.

The following are the grounds of appeal :

1st, that the submission put in evidence marked A. supports the award declared upon. As it gives the arbitrator power not only to award in reference to a lease and the terms of said lease, but also *what shall otherwise be done* by either of said parties respecting the matters in difference.

2nd, that the matters in difference mentioned in the said submission in respect to a lease, and the terms of said lease, refer to a holding of said premises, and the terms of such holdings, and the work sued for, done in pursuance of said award, one-fifth of which by said award was ordered to be paid for by the defendants, was a part of the terms upon which the defendants were to hold the said premises.

3rd, that the defendants having admitted at the trial the due execution of the submission, and the award produced, cannot object to the validity of the award declared upon on account of the award not being supported by the submission under a plea of "never indebted."

4th, that if there was a lease executed by the parties it should have been pleaded by defendants, and unless shewn by defendants that a lease exists, an action on the award will lie.

5th, if the lease was executed by the said parties the remedies upon the award and release would have been concurrent.

6th, that the award was executed on the 24th of March, 1860, since which time, as appeared by the evidence produced at the trial, the defendants have been in the use and occupation of the premises, and have paid rent therefor in pursuance of the award. That the work done by plaintiff in accordance with the award, was beneficial to defendants and used by them, so that the defendants by thus acquiescing in said award, and in part performing it, concurred in and ratified it, and are now estopped from disputing its validity.

7th, that from the use and occupation by defendants of the premises, and from their use of the wheel, flume and bulkhead, put in by plaintiff, this action may be sustained under the count for work and labour and for materials provided.

Britton for the appellant, cited *Russell on Awards*, 521, 523

525; Edwards v. Bates et al., 7 M. & G. 590; Filmer v. Rurnby, 2 M. & G. 529; Yates v. Aston, 4 Q. B. 182; Spooner v. Payne, 4 Com. B. 328.

McLennan for respondent.

DRAPER, C. J.—The action is rested and the breach assigned exclusively on the following clause of the award, “and we further award that should it be deemed necessary for the mutual benefit of the said Daniel S. Abbott, and Silvester Skinner and Silvester Case Skinner to put in a new wheel, flume and bulkhead, or any of them before the first day of next October, then the said Sylvester Skinner and Sylvester Case Skinner shall pay one-fifth of the expense incurred upon an account for the same being rendered and vouched for as before stated for their said proportion of future repairs.

The defence to this is, that the submission gave the arbitrators no authority to award upon this particular matter, and that under the plea of never indebted this defence may be raised.

As to the last point, I am not disposed to question the opinion expressed in *Hodgson v. The Municipality of Whitby*, 17 U. C. Q. B. 230, though the point did not directly arise there, and in *Russell on Awards*, 520, it is considered as undecided whether *nunquam indebitatus* is an admissible plea in debt on award, though if it be, the learned writer is of opinion apparently that it would put the submission in issue.

As to the other point, I have, though not without some hesitation brought myself to the same conclusion as the learned judge in the court below, and think that this particular matter does not fall within the terms of the submission, and therefore that the appeal should be dismissed with costs.

Per cur.—Appeal dismissed.

CORBETT V. JOHNSTON, ET AL.

Replevin—Taxes—Distress for—Legal as to part.

A collector having legal authority (the tax roll) for the collection of three sums being the rates for three specific years due for taxes, distrains by his bailiff for the amount of them with other sums not properly collectable. Upon replevin, *held*, that the three legal distresses were separable from the illegal ones, and until the sums due on them were paid replevin would not lie, and that the defendants were entitled to the *possession*.

Held, also, that a collector is responsible for the acts of his bailiff holding legal authority (by warrant) from him so to act, and that an action will lie against them jointly.

DECLARATION for goods and chattels and all the household furniture of plaintiff in his house on Queen street in Kingston.

Plea, by (Consolidated Statute for Upper Canada, ch. 126, secs. 11 and 20, public act passed in the 22nd year of her Majesty's reign,) that defendants did not take and unjustly detain the said goods, chattels and personal property in the declaration mentioned in manner and form as in the said declaration is alleged.

At the spring assizes, 1861, at Kingston, a verdict was taken for the defendants subject to the following special case :

This action was brought in respect of a distress of the plaintiff's goods, chattels, and personal property, namely, eight horses, one table, one clock, one buggy, one carriage, and all the household furniture of the plaintiff taken under the warrant produced, filed and marked A., of which the following is a copy :

1854.	432.	C. Miller,	\$25.00.	1858	\$402.34
1854.	430.	E. Williams	40.00.	Interest on same		80.00

\$65.00.

A.	1859. Balance	137.13
	1860. Self & tenant...	340.60
	1854. Sec tenants.....	65.00

\$1025.07
137.13

887.84

Balance 1859, \$137.13, paid 15th Decr. 1860.

(Signed,)

ALEX. BOWLES.

"City of Kingston. Tax warrant for 1860, and other years.

"To *Alexander Bowles*, Bailiff.

"You are hereby authorised and required to distrain the goods, chattels, and effects of *Thomas A. Corbett*, which you shall find upon the premises of the said *Thomas A. Corbett* or elsewhere in the city of Kingston, for the sum of one thousand and twenty-five dollars seven cents, (see memorandum,) rated against him and now in arrear and unpaid and in default of payment of such rate or rates, and the lawful costs and expenses of the said distress to sell and dispose of the said distress according to law for the recovery of the said rate or rates, together with the said costs and expenses according to law, and for your so doing this shall be your sufficient warrant.

"Given under my hand and seal at the city of Kingston aforesaid this thirteenth day of December, in the year of our Lord one thousand eight hundred and sixty.

(Signed,) "CHAS. JOHNSTON,
"Collector."

The plaintiff admitted the collector's rolls for the municipality for the years 1852, 1858, 1859, and 1860, and that the extracts of said rolls put in, filed and marked C. D. E. and F., were true extracts thereof.

The plaintiff admitted that at the time of the levy the defendant Johnston had in his possession the collector's rolls of the said municipality for the said years 1852, 1858, 1859 and 1860.

The plaintiff admitted a separate demand from him by the defendant Johnston, say in October, 1860 of each of the sums of \$402.34, \$137.13 and \$340.60, and fourteen days before distress, and that the first sum was composed of arrears of taxes for 1852 and 1858, that the second sum was arrears for 1859, and that the third sum was taxes for 1860 as per extracts of said rolls and said note.

The plaintiff admitted that at the time of the distress the defendant Johnston was collector of the municipality of the city of Kingston, and said defendant Bowles his bailiff, and that defendant Johnston had been such collector for the years 1858, 1859 and 1860.

The plaintiff further admitted that at the time of the taking, the said goods, &c., were in the possession of the

plaintiff in the city of Kingston, and that the plaintiff was a resident of the said city during the years 1852, 1858, 1859 and 1860.

The defendants admitted the taking under the warrant produced of the goods, chattels and personal property in the declaration described, and justified as for a distress for the sums of \$402.34, \$137.13, and \$340.60. And the defendants further admitted the payment by the plaintiff after such taking and before action brought of the sum of \$137.13, being the arrears for 1859; and the plaintiff admitted that no tender or payment except the said sum of \$137.13 was ever made by the plaintiff on account of the said taxes \$402.34, \$137.13, and \$340.60.

The defendants admitted the receipt of J. H. Stephens, a former collector of the city of Kingston for £11 5s., arrears of taxes for 1854, and as to this the defendants did not justify, neither did the defendants justify as to the \$80.00 of interest.

If the court were of opinion that on the above case the action could be maintained the present verdict for the defendants to be set aside and a verdict for \$4 to be entered for the plaintiff, and if the court were of opinion that the defendants were entitled to prevail, the present verdict to stand.

The case was argued by *Richards*, Q. C., for plaintiff. He argued that the action was properly brought and maintainable because the corporation was not responsible for the collector's acts, that on this warrant the amounts are not distinguishable, and there is no authority to take any sum less than the whole. He cited *Gov. of Bristol, &c., v. Wait*, 1 Ad. & E. 264; *Sibbald v. Roderick*, 11 Ad. & E. 38; *Clark v. Woods*, 2 Ex. 395; *Skingley v. Surridge*, 11 M. & W. 503.

D. B. Read, Q. C., for defendants, contended that the whole distress was illegal because it was partly so, and therefore replevin will not lie; that the action should have been brought for excessive distress. He argued that replevin could not be maintained against the collector. That the warrant containing some illegal items rendered the whole

void. He referred to *Gov. of Bristol, &c., v. Wait*, 1 Ad. & E. 264; *Millward v. Coffin*, 2 Wm. B. 1332; *Skingley v. Surridge*, 11 M. & W. 503; *Allen v. Sharp*, 2 Ex. 352; *Cortis v. Kent Water Works Co.* 7 B. & C. 314; *Spry v. McKenzie*, 18 U. C. Q. B. 161; *Municipality of London v. G. W. Ry. Co.* 17 U. C. Q. B. 262; *Newberry v. Stephens*, 16 U. C. Q. B. 65; *Patchett v. Bancroft*, 7 Term R. 367; *Mellor v. Leather* 1 E. & B. 619; *Sturch v. Clarke*, 4 B. & Ad. 113.

DRAPER, C. J.—It is a part of the case that the defendant Johnston was at the time of the distress, and had been for the years 1858, 1859 and 1860, collector of taxes for the city of Kingston, and that the defendant Bowles was his bailiff, acting under the warrant set out. That Johnston as such collector in October, 1860 demanded the three several sums of \$402.34, (which is composed of arrears of taxes for 1852 and 1858,) of \$137.13, which consisted of arrears of taxes for 1859, and of \$340.60, which was the amount of taxes for 1860. Johnston at the time of making the levy had in his possession as city collector the tax rolls for 1852, 1858, 1859 and 1860.

The warrant given by Johnston to the defendant Bowles commanded him to distrain for \$1027.07, and the three sums so previously demanded by the collector amounted only to \$880.07. The difference between the three sums (\$145) was composed, 1st, of taxes due by plaintiff for 1854, the roll for which year was not so far as we see in Johnston's possession, nor is any proof afforded that the plaintiff was liable for \$65 taxes for that year as mentioned in the memorandum on the face of the warrant. 2nd, of a sum of \$80, charged as interest upon the sum of \$402.34.

Treating the levy by the bailiff in the same light as if the collector had been actually present doing the act himself, the case amounts to this, the collector had authority under three tax rolls, to demand, and in the event of non-payment within a limited time to distrain for three several sums. He made a proper demand; payment was not made, and after waiting as long as the law required be distrained

for these three sums, and also for two other sums which he had no lawful authority to collect. The question is, whether taking the form of the warrant in connection with the other facts—his distraining for too much avoided the whole, so the plaintiff can replevy his goods and relieve them from the lawful demand, because another demand not lawful has been combined with it.

The cases of *Hurrell v. Wink*, (8 Taunt, 369,) *Milward v. Caffin*, (2 W. Bl. 1332,) and *Sibbald v. Roderick*, (11 A. & E. 38,) establish a distinction between distresses for rent and distresses for rates or other cases under statutory authority, and decide that if rates which are properly and formally charged and imposed, are joined in the same warrant with others irregularly imposed, and therefore not recoverable, and the amount of both is blended into one sum, a warrant is not sustainable for any part.—*Clark v. Woods*, (2 Exch. 395,) to some extent rests on a similar foundation. In that case in which a warrant had issued to arrest for non-payment of two sums and as to one the warrant was wrong, *Alderson, B.*, suggested that perhaps one warrant would have been sufficient, if it had observed the proper distinction as to each sum. And so by analogy, possibly if this warrant had directed the bailiff to distrain for several sums the amount of the several rates, the warrant might have been upheld for the sums really due.

There is a difference however to be noted between those cases and the present. A warrant issued by one or more justices of the peace was necessary in each of them to authorise a distress or an arrest, and before the justices could properly act, certain information ought to have been laid before them. But under our assessment law (Consolidated Statute, U. C. ch. 55, sec 93, *et seq.*) the collector, after calling on the person taxed and demanding payment, has authority, in case of refusal or neglect to pay, to levy the sum mentioned in the roll as payable by such person, by distress and sale of his goods, without any other intermediate proceedings. In effect, the statute makes the roll after demand and refusal equivalent to a warrant to levy.

Then as to the three sums of \$402.34, \$137.13, and

\$340.60, the collector had a separate roll, equivalent after demand and refusal, which are shewn, to a separate warrant for each. Had he gone in person to distrain I do not apprehend he need have carried the rolls with him. It would have been enough that he should have distrained for the three sums, one on each roll. If he distrained at the same time for other sums not authorised by law, no case goes the length of deciding that the distress would have been invalid. It must have been deemed severable or the goods would be considered *in custodia legis* under the first lawful seizure, and subject to the other lawful claims, and the plaintiff if he desired to relieve his goods, must have paid or tendered the three sums, and then he might have resisted payment of the residue and replevied his goods.

The warrant in this case, though necessary to enable the defendant Bowles to act for the collector, was not necessary to authorise a distress being made, and is not therefore like those in the cases cited, without which the parties making the distress, &c., would have been mere trespassers. Moreover, on the face of it, was the very information which the collector himself would have given, if with no warrant, but three tax rolls, he had distrained the plaintiff's goods—information sufficient to enable the plaintiff to know what he was legally liable to pay.

In *Hurrell v. Wink*, the court says "the party rated was entitled to a precise demand of the sum actually due for the poor rate previously to the issuing of the warrant of distress." And as no such demand appeared to have been made, they held the plaintiff entitled to recover.

Here the three sums actually due were legally demanded and in this respect the case is distinguishable, and in *Sibbald v. Roderick*, there was no distinction between the sums justly claimable and those not so, and no proof appears that a several demand for the different rates had been made.

Then, if as to these three sums, the collector is to be treated as if acting under three separate warrants, his distraining without authority for other sums cannot vitiate the whole distress founded on the tax rolls. As each of them stood on an independent and unimpeached basis, the plaintiff cannot relieve his goods without satisfying them.

It has not been suggested on the part of the defence, that as to the rates comprised within the three sums specified, there was any want of legal authority to levy them by distress. The objection is to the other part of the demand, and the blending the whole into one sum.

I have no doubt replevin lies against the collector in this case as well as against the bailiff employed by him. In *Fraser v. Page*, 18 Q. B. U. C. 336, Sir J. B. *Robinson*, C. J., said, "of course the collector would be liable for anything done which he had authorised the bailiff to do." Here the authority was expressly given, and has been executed accordingly.

On the whole I am of opinion this case is distinguishable from the authorities cited, and that the *postea* should be delivered to the defendants. I assume three legal rates in force, and three separate tax rolls each to collect one of them. For so much I hold the distress valid, and as a consequence that the plaintiff could not replevy while those rates were unpaid.

Per cur.—*Postea* to defendants.

CORPORATION OF ESSEX V. BULLOCK ET AL.

Bond—Joint and several.

G. B., J. P., J. H. W., S. S. McD., J. C., J. F., and J. B. L. entered into a bond to the municipal corporation of the County of Essex, as follows: "We G. B., &c., are jointly and severally held and firmly bound, &c., unto, &c., in the several penal sums of money hereinafter mentioned, that is to say, the said G. B. in the sum of £3,000, the said J. P. in the sum of £500, the said J. H. W. in the sum of £500, (and all the rest in similar sums of £500 each,) for which several payments to be well and truly made, we and each of us bind ourselves, and each and every of our heirs, executors and administrators," &c. *Held*, to be a several and not a joint or joint and several bond.

PLAINTIFFS claimed £6,000, on a bond dated the 28th January, 1858, whereby the defendants acknowledged themselves to be held and firmly bound to the plaintiffs in £6,000, conditioned, after reciting that George Bullock as treasurer of the County of Essex had been required by the plaintiffs to give security for the faithful performance of his office,

and especially for the accounting for and paying over all moneys which might come to his hands by virtue of his office, that if Bullock should faithfully perform, &c., and should receive and safely keep all such moneys, &c., and should duly pay all such sums as he should be directed by any lawful order of plaintiffs, or under any law, &c., and should obey any law or by-law, and when required render just and true accounts of all such moneys, &c., and should not wilfully suffer any embezzlement or misapplication of such moneys, &c.

Among other pleas *non est factum* was pleaded.

The case was referred at *nisi prius* to arbitration. The order at *nisi prius*, among other things directed that the award should be subject to any question of law that might arise.

The award set out the bond as follows: "Know all men by these presents that we George Bullock of the town of Sandwich, in the county of Essex, of the province of Canada, Esquire, treasurer of the said county of Essex, John Prince of the said town of Sandwich, Esquire, James Hands Wilkinson of the said town of Sandwich, Esquire, Samuel Smith McDonald, of the town of Windsor in the said county of Essex, Esquire, John Clark of the said town of Windsor, gentleman, James Finly of the town of Amherstburg in the said county, gentleman, and John Laughton of the said town of Sandwich, Esquire, are jointly and severally held and firmly bound unto the municipal corporation of the said county of Essex in the several penal sums of money hereinafter mentioned, that is to say, the said George Bullock in the sum of £3,000, the said John Prince in the sum of £500, the said James Hands Wilkinson in the sum of £500, the said Samuel Smith McDonald in the sum of £500, the said John Clark in the sum of £500, the said James Finly in the sum of £500, and the said John B. Laughton in the sum of £500 of lawful money of Canada, for which several payments to be well and truly made, we and each of us bind ourselves, and each and every of our heirs, executors and administrators."

The last clause of the order of reference was that the plain-

tiffs might elect to take a nonsuit if the court should be of opinion that the bond declared on to be not joint and several, and that if the plaintiffs do not so elect judgment may be entered for the defendants.

The arbitrator awarded in favor of the plaintiffs for £449 16s. 10d., on the 23rd of March, 1860.

There were several other causes in this court against different sureties of the treasurer George Bullock, on other bonds given during various years that he had held the office of treasurer. And they were all referred at the same time and in the same manner to the same arbitrator, who in every case made an award in the plaintiffs' favor.

In Easter Term, 23 Vic., a rule *nisi* was obtained in each cause to set aside the award, for misconduct in the arbitrator in several alleged particulars. This particular case was not argued. But the parties had agreed that whatever decision the court arrived at in the case that was argued, which was that of these plaintiffs against J. Prince, should be accepted in the others. The court ordered that the award should be referred back to the arbitrator, in order that he might find and certify certain facts, the finding of which was necessary to the determination of questions of law which had been raised, or which the defendants were desirous of raising.

The arbitrator having made a report and finding, but leaving his award untouched—

A. Prince, in Hilary Term last obtained a rule *nisi* to set the award aside on the following grounds :

1st, the want of any valid appointment of Bullock as treasurer for the period during which defendants were sureties.

2nd, the bond is a several, or at least not a joint bond. If joint, all the parties are not sued. It is insufficient in form to sustain this action, and the resolutions of the council shew that it was not accepted nor intended to be the security required by the statutes.

3rd, the defalcations alleged are in funds which plaintiffs are not entitled to recover against defendants.

4th, the auditing and allowing of the treasurer's accounts by the auditors and finance committees of the council preclude plaintiff from recovering for defaults prior thereto.

5th, the arbitrator has not sufficiently complied with the rule referring back the award, in finding the facts required by the court.

6th, the arbitrator has improperly refused to inform defendants of the items of defalcation alleged so as to enable them to answer the same.

7th, the evidence on which the award is founded is insufficient to charge defendants, or some of them, as is shewn by the arbitrator's answer to the question concerning the same.

8th, the awarding costs of reference and award to be paid by defendants is an excess of authority.

In Easter Term, *Connor, Q. C.*, and *M. C. Cameron* shewed cause. There were two points in this cause which had not been raised in the argument of the same plaintiffs against Park, which immediately preceded it. One was with reference to the power of the county municipality to recover from the treasurer the wild land tax due in the different townships. This the defendants' counsel announced they should not press. The remaining question was as to the action being maintainable on this bond as a joint bond, as to which the plaintiffs' counsel agreed that the bond is several and not joint, each bound for his own sum as a quasi principal and as surety is bound for each of the others, and cited *Tippins v. Coates*, 18 Beav. 401.

Eccles, Q. C., and *Prince, A.*, contra, cited *Collins v. Prosser*, 1 B. & C., 682, and *Fell v. Goslin*, 7 Exch. 185.

DRAPER, C. J.—In *Tippins v. Coates*, the bond stated that B. C., J. H. and H. J., became bound to G. S., in £2,000, "for the true payment whereof we bind ourselves jointly and our *respective* heirs, executors, and administrators. The condition of the obligation is such that if the above bounded B. C., &c., or either of them, their, or either of their heirs, executors, or administrators shall pay &c., this obligation to be void."

The court held this was a joint and several obligation.

The difference between that bond and the one in the present case is too obvious to call for remark.

The case of *Collins v. Prosser*, 1 B. & C. 682, cited by Mr. *Prince* is much more to the point. There the bond was in the following form: "I, G. B. M. am held and am firmly bound to, &c., in the sum of £12,000, for which I bind myself, &c., and I, J. E. W. am held and firmly bound in the sum of £3,000, for which I bind myself, &c., and we, P. P., S. J., and W. E. are also held and firmly bound in £2,000 each, for which we bind ourselves, and each of us for himself for the whole and entire sum of £2,000 each, and we Sir N. C., G. S. W., and J. W., are also held and firmly bound in £1,000 each, for which we bind ourselves and each of us for himself for the whole and entire sum of £1,000 each." The court held that this was a several bond only.

I consider the present case even stronger for the defendants. The first obligor, Bullock, for whom, according to the recital preceding the condition, the other obligors are sureties, is bound in £3,000. According to the meaning put on this bond by the declaration each surety is bound in a sum of £500, and the plaintiffs' argument would make each liable for the sum for which the principal stands bound, and also for each sum of £500, for which each of the other sureties has bound himself. In fewer words, each defendant who has bound himself expressly in the sum of £500, may be called upon to pay £6000, and assuming the insolvency of the principal, each would have, if the defalcation amounted to £6,000, to pay £1000.

It is as plain as possible that the treasurer was to give his own bond for £3,000, and to find sureties for £3,000 more, and this the bond effects, and in language that, unequivocally as I think, severs the liability of the principal from that of the sureties. And I am of opinion that each surety is not liable *with* the principal, nor yet *with* either of the co-sureties for any part of the several sums of £500 for which each stands bound. It is true the word "jointly" is used, but unless it is construed to mean no more than that all join in

one instrument as the instrument distinctly expresses for distinct and separate sums, it would be repugnant to every other expression in the bond.

I have no doubt, therefore, that this bond does not support the declaration; that it is a several and not a joint, or a joint and several bond, and therefore according to the last clause in the rule of reference, unless the plaintiffs elect to take a nonsuit, the rule must go to deliver the *postea* to the defendants that judgment may be entered for them.

Per cur.—Judgment for defendants.

MEAGHER V. THE HOME INSURANCE COMPANY.

Policy of insurance—Condition written across the face—To prevail over the policy if at variance therewith.

**Held*, that the condition clause written across the face of a marine policy of insurance must prevail over the printed parts of the policy which are at variance with it.

For a statement of case and argument, see 20 U. C. Q. B. 607.*

DRAPER, C. J.—We have already had this case before us on demurrer, which we decided rather more than a year ago. It now comes up before us on a motion to enter a nonsuit made pursuant to leave reserved by *McLean, J.*, before whom the case was tried at the last Toronto winter assizes.

A similar rule was disposed of a few days ago by the Court of Queen's Bench, in a case brought by the same plaintiff against the *Ætna Insurance Company* on a policy of insurance on this same steamer *Boston*. We have had the advantage of perusing the opinion delivered in that case by the Chief Justice of Upper Canada, and agree entirely in the conclusion arrived at, and are satisfied to pronounce the same judgment.

I agree that this case must be decided by the law in force in Upper Canada. That the condition, clause or memorandum written across the face of the policy, must prevail over

*Note—See *Meagher v. The Ætna Insurance Company*, 20 U. C. Q. B. 607.

the parts of it which are at variance therewith, and that there was no evidence whatever of an actual total loss.

I think also that according to our law the evidence does not establish a constructive total loss. That it might well sustain a claim for a partial loss, is, I think, not to be denied, but no such claim is available upon this policy as I construe it.

I repeat the language of Lord *Ellenborough*, cited by Sir *J. B. Robinson*, C. J., from *Arnould on Insurance*, (2nd ed., p. 1011.) "The nature of the damnification at the time when the action was brought is to be regarded as the criterion of the right to recover as for a total loss, and if at that time what had antecedently been a total loss has by subsequent events ceased to be so and become an average loss merely, a compensation for an average loss can alone be recovered." Chapter 8, sec. 2, of Mr. *Arnould's* work contains an elaborate review of the cases on this head.

I think the rule for a nonsuit should be made absolute.

Per cur.—Rule absolute.

HERVEY ET AL. V. PRIDHAM.

Promissory note—Payable in Lower Canada, and payee and drawer residents of Upper Canada—Lex loci—Lex fori—Statute of Canada, 12 Vic., ch. 22.

A person resident in Upper Canada being in Lower Canada, makes two promissory notes, each payable at a place certain in Lower Canada, several months after date, to another person also resident in Upper Canada, who at the time carried on business as a forwarder in Lower Canada. While the notes were still held by the payee, and after they were due, and more than five years before the commencement of the suit, the defendant and payee met together in Lower Canada, so that the payee might have brought an action against the defendant, the notes were after this endorsed to the plaintiffs, neither of whom were residents of Lower Canada, the notes fell due in July and December, 1854, and this action was commenced in September, 1860.

Held, that the parties being residents in Upper Canada when the notes were made, when they became due, and when they were dishonoured, the statute of Canada, 12 Vic., ch. 22, sec. 31, did not bar the plaintiff's recovery, and that statute applies to the remedy, and not to the contract itself.

Richards, J., dissentiente.

The declaration contained two counts, one on a promissory note dated 11th January, 1854, payable to Alfred Hooker, or order, at six months after date, the other on a note similarly drawn, at eleven months after date, averring that

Alfred Hooker endorsed to the plaintiffs, and that the defendant did not pay.

The defendant pleaded that the notes were made out of Upper Canada and the jurisdiction of this court, at Montreal in Lower Canada, and after the passing of the act of Canada, 12 Vic., ch. 22, by which act and the law of Lower Canada, all bills, foreign or inland, and all notes due and payable in Lower Canada, made after that act came into force (1st August, 1849) should be held and taken to be absolutely paid and discharged, if no suit or action should be brought thereon within five years next after the day on which they should become payable.

Averment, that each note was payable on the face thereof, and as part of the defendant's contract, at the Commercial Bank in the city of Montreal, and that each note became payable in Lower Canada more than five years next before the commencement of this suit, and that this suit was not brought until the said five years had expired.

Replication, that at the time of making the notes, and thence until the endorsement thereof, Alfred Hooker was a British subject resident in Upper Canada; that at the time of the endorsement and thence hitherto, the plaintiff Hervey was a British subject, resident in Upper Canada, and the plaintiff, Henry Hooker, was an American subject, resident in the United States; that at all the times aforesaid the defendant was a British subject, resident in Upper Canada, and that in fact neither of the notes have been paid or discharged, but the whole, and every part thereof, is still unpaid.

Rejoinder, that after the notes became due, and while the payee was the holder thereof, and more than five years next before the commencement of this suit, the payee, Alfred Hooker, carried on business as a forwarder in Lower Canada, and he and the defendant, after the notes became due, and more than five years next before the commencement of this suit met together at the city of Montreal, in Lower Canada, and Alfred Hooker might have brought his action on the notes, and that the plaintiffs first received the notes from Alfred Hooker after he and the defendant so met in Montreal,

and long after they became due, and that by the law of Lower Canada, the notes, by reason of the promiscs, became absolutely discharged, and not merely the remedy for the recovery thereof barred.

To which the plaintiffs demurred.

Crombie, in support of the demurrer cited *Ridout v. Manning*, 7 U. C. Q. B. 35; *Huber v. Steiner*, 2 Bing, N. C. 202; *British Linen Company v. Drummond*, 10 B. & C. 903; *Potter v. Brown*, 5 Ea. 124. Storey's Conflict of Laws, sec. 582, b.

M. C. Cameron, contra, relied upon the case of *Potter v. Brown*, 5 Ea. 124.

DRAPER, C. J.—The case, as appears on the pleadings, may be thus stated. A person resident in Upper Canada, being in Lower Canada, makes two promissory notes, each payable at a place certain in Lower Canada, several months after date to another person also resident in Upper Canada, who at the time carried on business as a forwarder in Lower Canada. While the notes are still held by the payee and after they are due, and more than five years before the commencement of this suit, the defendant and the payee met together in Lower Canada, so that the payee might then have brought an action against the defendant. The notes were after this endorsed to the plaintiffs, neither of whom were residents in Lower Canada. One of the notes fell due on the 14th July, 1854, the other on the 14th December, 1854, and from the statement introductory to the declaration, it appears this action was commenced on the 18th September, 1860.

The defence is, that by the statute 12 Vic., ch. 22, sec. 31, and by the Law of Lower Canada, any note payable in that part of the Province of Canada, is held and taken to be absolutely paid and discharged—if no action is brought thereon within five years next after the day on which it becomes payable, and that this suit is not brought until after such five years have expired.

Two questions present themselves, 1st. Suppose those

notes to have been payable in some one of the United States in which a law precisely similar to the stat. 12 Vic., ch. 22, was in force, would this action, under the circumstances pleaded, be barred?

2nd. If not; does it make any difference in the principle of decision, that the notes were payable in Lower Canada, and the statute was passed by the legislature of the Province of Canada.

In disposing of the first question all must turn upon this, whether the law now sought to be enforced is a law which relates to the contract itself, or only to the remedy. The defendant in his plea sets up the former. If this point be settled then we know whether to apply the *lex loci contractus* or the *lex fori*.

At first sight the language of Lord *Ellenborough*, in *Potter v. Brown*, 5 Ea. 124, might appear decisive of the question. He says, "the rule was well laid down by Lord *Mansfield* in *Ballantine v. Golding*; that what is a discharge of a debt in the country where it was contracted is a discharge of it every where."

In the case referred to by Lord *Ellenborough*, there was a motion to enter an *exoneretur* on the bail piece, on the ground that the defendant had become a bankrupt, and had obtained his certificate in Ireland, the action being brought on a bill of exchange drawn in Ireland and accepted by the defendant who resided there, and this case appears to have been decided on the authority of *Burrows v. Jemino*, 2 Str. 733, when a perpetual injunction was granted to restrain an action against the plaintiff on a bill of exchange accepted by him at Leghorn. The plaintiff had been discharged and his acceptance vacated by the judgment of a competent tribunal at Leghorn.

In these, and a great many similar cases, the discharge under the foreign law had been obtained in some suit or cause or proceeding, before a tribunal authorised to administer that law. In *Potter v. Brown*, Lord *Ellenborough* is referring to the discharge of a debt by proceedings in bankruptcy before a foreign court, so was Lord *Mansfield* in *Ballantine v. Golding*, and in *Burrows v. Jemino*, the Lord Chancellor acted upon the foreign judgment.

But the question raised here is of a different character. It is exactly like that suggested in Story's Conflict of Laws, sec. 582. The statute of Canada, pleaded by the defendant, which for the moment I am treating as a foreign law, has not only extinguished the right of action in Lower Canada, unless it be brought within five years, but has also *ipso facto*, extinguished the claim itself, and declared it to be, after the lapse of that period, an absolute nullity. Does that act operate so as to make the claim a nullity before our tribunals in Upper Canada, the language of the statute applying to Lower Canada only.

In *Beckford v. Wade*, 17 Ves. 87, it was decided that a statute of Jamaica, which converted a possession for seven years under a deed, will, or other conveyance, into an absolute title, and provided that after such possession the party should be entitled to give the act in evidence or plead it in bar, in any suit, claim or demand, was a complete and effectual bar to a suit brought to establish a right to real estate, of which there had been such a possession held, and this, although, for all that appeared, the claimant had never been in Jamaica. This act, however, related to real estate, and the *lex loci rei sitæ* might be well deemed entitled to prevail.

Here, however, it is the extinguishment of a debt only which is in question. The reasoning of Lord *Brougham* in *Don v. Lippman*, 5 Cl. & Fin. 15, appears to me entitled to the greatest consideration in reference to the nature of the contract on the part of the debtor. "The law does not suppose that he is at the moment of making the contract contemplating the period at which he may be freed by lapse of time from performing it. The argument that the limitation is of the nature of the contract, supposes that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition that the contracting parties look only to the period at which the statute of limitation will begin to run."

In *Huber v. Steiner*, 2 Bing. N. C. 202, Sir N. *Tindal* comments on the general rule, that Statutes of Limitation operate on the time and mode of bringing the action, and do not

apply *ad valorem contractus*, and refers to the distinction suggested by Story, and already referred to, which he observes when taken with the qualification annexed to it by the author himself, appears to be well founded. "That qualification is that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case, and with such restriction it does indeed appear but reasonable that the part of the *lex loci contractus* which declares the contract to be absolutely void at a certain limited time without any intervening suit, should be equally regarded by the foreign country as the part of the *lex loci contractus* which gives life to, and regulates the construction of the contract; both parts go equally *ad valorem contractus* both *ad decisionem litis*."

On the same subject the following observations of Lord Brougham, in *Don v. Lippman*, 5 Cl. & Fin. 13 are applicable. "When both the parties reside in the country where the act is done, they look of course to the law of the country in which they reside. The contract being silent as to the law by which it is to be governed nothing is more likely than that the *lex loci contractus*, should be considered at the time the rule, for the parties would not suppose that the contract might afterwards come before the tribunals of a foreign country; but it is otherwise when the remedy comes actually to be enforced. The parties do not necessarily look to the remedy when they made the contract. They bind themselves to do what the law they live under requires, but as they bind themselves generally it may be taken as if they had contemplated the possibility of enforcing it in another country."

In this case, although the promissory notes were both made payable in Lower Canada, and therefore the contracts they express are, as to validity, nature, obligation and interpretation to be governed by the law of Lower Canada, yet it is admitted, that both the maker and the payee were at the time of the making, and indeed ever since, residents in Upper Canada, and that except on one solitary occasion the plaintiff was not in Lower Canada to sue nor the defendant to be sued, during the whole five years. If the notes were actually made in Upper Canada there would be much reason

to apply Lord *Brougham's* language as to what the contracting parties had in contemplation; and as to the debt being under such circumstances extinguished, the reasoning in *Huber v. Steiner* appears to me to be altogether in the plaintiffs' favour.

I therefore conclude, that as the parties were residents in Upper Canada, when the note was made, when it became due, and when it was dishonoured, in short, with the single exception adverted to, during the whole five years, the statute in question treating it on the footing of the law of a foreign country, does not bar the plaintiffs' claim.

The second question was not raised at the bar. The stat. 17 Vic., ch. 22, was passed by the legislature of the province of Canada, of which province Upper Canada is as much an integral part as Scotland is of the United Kingdom. In *Sidaway v. Hay*, Lord C. J. *Abbott*, speaking of the British Statute, 54 Geo. 3, ch. 137, entitled, "An act for rendering the payment of creditors more equal and expeditious in Scotland," remarks: "The statute is an act of the parliament of the United Kingdom, competent to legislate for every part of the kingdom, and to bind the rights of all parties residing in England equally with those of persons residing in Scotland. There is, therefore, no question as to the authority of the power by which the statute was passed, and the question must turn entirely upon the construction and effect of the statute," and after commenting upon various sections of it, his lordship concludes, "It being clear that the bankrupt is deprived of all his property for the benefit of his creditors who choose to partake of the distribution of it, by an act of the legislature having authority over all parts of the United Kingdom, justice seems manifestly to require that no one who may partake of the benefit shall be allowed to sue the debtor, whose all has been thus given up, if by accident he may happen to meet with him in England."

Every word of the former part of this quotation applies here, and we must determine whether on the true construction of the act its provisions extend to relieve a party resident in Upper Canada when the debt became due, and who had been so resident when he entered into the obligation,

and during the whole currency of the period of limitation from the fulfilment thereof according to the law of Upper Canada, especially when the party to whom the obligation was given, was a resident in Upper Canada during the same period. I think it cannot be properly affirmed that justice seems manifestly to require that the payee of a note, who resides in Upper Canada should be compelled to sue upon it in Lower Canada, because it has been made payable there, and still less that such compulsion should exist when the debtor has, during the period of limitation, also resided in Upper Canada, nor do I find in the act itself evidence of an intention that its provisions should extend beyond the jurisdiction of the courts of Lower Canada.

In the case of *Ridout v. Manning*, 7 U. C. Q. B. 35, the judgment of the court was that the provisions of the statute which related to the presentment of notes and inland bills to the makers and drawers, did not extend to Upper Canada; and in the Consol. Stat. of Upper Canada, ch. 42, only the 4th and 23rd sections of this statute are referred to in the re-enactment, and those sections relate to matters for which independent provision existed in Upper Canada, by statutes included in these very sections of the consolidated act.

Moreover it is to be remembered that the Statutes of Limitation in force in Upper Canada fix a different term from that in the act under consideration. The cause of action is transitory for *debitum et contractus sunt nullius loci*, and though the contract required that the note should be presented for payment in Lower Canada, it does not require that any action for a breach of it must be instituted there, while on the other hand, the absence of the debtor from Lower Canada during the whole term of prescription, might render a suit during that term impossible, and the act contains no provision for any disabilities which might prevent the bringing an action to enforce the claim. If indeed the plaintiff had brought an action there, and judgment had been rendered for the defendant in pursuance of this section of the statute, it would have been a very different matter.

The defence is one clearly arising *ex post facto*. The defendant cannot urge here, as in *Sidaway v. Hay*, that he

has been deprived of all his property for the benefit of his creditors, and that this plaintiff might have come in to share. He is, on the contrary, urging that he should be protected by a local law, and discharged without paying any thing, while for all that appears, except on one occasion, he has not been even within the locality, and was at no time a resident there, at a time when he could have been made amenable to his creditors' suit.

Upon the whole, thinking that this section of the 12 Vic., ch. 22, rather applies to the remedy to enforce the contract, than governs or affects its interpretation, and that no part of the act, indicates any intention to do more than affect rights claimed and proceedings instituted to enforce them in Lower Canada, I have arrived at the conclusion that the plaintiffs should have judgment on the demurrer.

See *Melan v. Duke of Fitzjames*, 1 B. and P. 138; *Imlay v. Ellefsen*, 2 Ea. 455; *British Linen Co. v. Drummond*, 10 B. & C. 903; *De La Vega v. Vianna*, 1 B. & Ad. 288; *Trim-bey v. Vignier*, 1 Bing. N. C. 151; *Allen v. Kemble*, 13 Jur. 287; *Potter v. Brown*, 5 Ea. 124; *Huber v. Steiner*, 2 Bing. N. C. 202; *Don v. Lippman*, 5 Cl. and Fin. 1; *Ped-der v. McMaster*, 8 T. R. 609; *Burrows v. Jemino*, 2 Str. 733; *Thorne v. Watkins*, 2 Vos 35; *Gibbs v. Fremont*, 9 Exch. 25; *Rothschild v. Currie*, 1 Q. B. 43; *Higgins v. Scott*, 2 B. & Ad. 413; *Kelsall v. Marshall*, 2 Jur. N. S. 1142; *Phillips v. Allan*, 8 B. & C. 477.

RICHARDS, J.—The notes declared on in this cause were made in Lower Canada, are payable there, and the payee, by whom they were transferred to the plaintiffs after they became due, carried on business in Lower Canada as a forwarder. No action, as far as we know, has been brought on the notes, or either of them, within five years after they became due. The payee of the notes and the maker have both resided in Upper Canada ever since the making of the notes, but have both been in Lower Canada since the notes became due, and have met there whilst the payee was the holder of the notes. The 31st sec. of prov. stat., 12

Vic., ch. 22, was in force in Lower Canada when the notes were made, and has been ever since. The portion of the section applicable to this case will read as follows: "All notes due and payable in Lower Canada made after this act shall come into force shall be held and taken to be absolutely paid and discharged if no suit or action is brought thereon within five years next after the day on which such bills or notes shall become due and payable."

In all cases where this section applies it will be held to extinguish the debt; not merely to bar the remedy as our Statute of Limitations does, the words of the section being "shall be held and taken to be absolutely paid and discharged." This language is quite different from that quoted in Huber and Steiner, under which *Tindal*, C. J., held that by the French code there was a mere limitation of the time for bringing the action, and that it was not an extinction of the contract. The language of the French code there quoted is as follows: sec. 3 of *prescription*—"All actions relative to letters of exchange, and to bills to order subscribed by tradesmen, merchants and bankers, or for matters of commerce prescribe themselves by five years; reckoning from the day of protest, or from the last suing out any judicial process if there hath been no judgment, or if the debt hath not been acknowledged by any separate act. Nevertheless, the pretended debtors shall be held if required to affirm upon oath that they no longer owe the money. And their widows, heirs, &c., that they *bona fide* believe there is nothing more due." Although Sir *Nicholas Tindal* seemed inclined to adopt the language of judge *Story*, that when the Statutes of Limitation extinguish the right of action, and the claim itself, the same may be set up in any other country to which the parties remove by way of extinguishment, "if the parties are resident within the jurisdiction during all that period, so that it has actually operated on the case:" nevertheless, Huber and Steiner is decided on the express ground that the French law only barred the remedy, but did not extinguish the debt. Judge *Story* in his *Conflict of Laws* in relation to this subject is only referring to the decision of courts under the comity

of nations in relation to what is strictly foreign law, and when, if there is anything which seems contrary to natural justice the courts of *locus fori* are not bound to carry it out. But there is an enactment by the legislature of the whole province, which declares that demands in the position of those sought to be recovered in this action "are to be taken to be absolutely paid and discharged." There are no such words added to the statute as "provided that the parties are resident in Lower Canada during all that period" of five years. We must, I think, assume that all the laws enacted by our own legislature are in accordance with right and natural justice and that we are bound to give effect to the same, though if passed by a foreign state we might say they were not such as by the comity of nations we were bound to carry out. In *McPherson et al. v. McMillan*, 3 U. C. Q. B. Reports, p. 34, an action had been brought in Lower Canada and a judgment there recovered against a non-resident defendant who had not been personally served with process; in the action on that judgment the right of the plaintiffs to recover was resisted on the ground that the proceeding against him in which the judgment was obtained without notice to him was contrary to natural justice. But on that point the court held, that as the proceedings complained of were authorised by an act of the legislature of the whole province, though legislating for Lower Canada only, they were binding on us, and such a defence was not sustainable.

The doctrine laid down by Judge *Story* and approved in *Huber* and *Steiner*, and the dicta of Lord *Brougham* in *Don v. Lippman* are not, as I understand, considered as settled law in England. Mr. *Westlake* in his late able work on Private International Law, in sec. 252, states that he considers the whole subject open for the higher English tribunals. In relation to the distinction taken by Mr. Justice *Story*, which was cited with approval in *Huber v. Steiner* I make the following extract from that section: "It was that the prescription of the *lex loci contractus* will extinguish the claim "if the parties are resident within the jurisdiction (of that law) during all that period, so that it has actually operated on the case;" then this part also of the

lex loci contractus would go *ad valorem contractus ad decisionem litis.*" It would be intelligible that the law of any country in which the parties have both been domiciled during the whole period of prescription fixed by it, should be held to extinguish the right on the ground of its having had them both for its subjects. But I do not understand why this should be asserted of the *lex loci contractus* more than of any other law. Nor how the question whether the *lex loci contractus* is effectual to mould the essence of an obligation can depend on subsequent events, when the efficacy of that law cannot be sustained at all except on principles which exhaust it at the moment of contracting, although indeed, which is an entirely different matter, that law if it be efficacious, may create at that moment obligations dependent on subsequent conditions." In section 250 of the same work he says, "There is nothing at bottom in any statute of limitations, but an essential modification of the rights created by the jurisprudence in which it exists, and which is therefore incapable of a just application to rights created by the jurisprudence of another country. The rule here advocated is also, as *Savigny* remarks, the most reasonable because it excludes both the arbitrary power of the plaintiff to choose between competing forums that which allows the longest terms of prescription and the arbitrary power of the defendant to defeat his creditor by removing his domicile to the forum which allows the shortest time, and avoiding, while it runs personal presence in the special forum of the obligation. The whole chapter in Mr. *Westlake's* book on "Extinction of Obligations" may be read with profit.

I see no particular hardship in applying the law of Lower Canada to this case. The payee of the note carried on business there, and the contract was made and was to be performed there, and the law of that country is what the parties contemplated should regulate their contract. If by the local law the prescription had been seven years instead of six before the debt was to be considered "as absolutely paid and discharged," I should have felt that we were bound to carry out the law. And the fact that the prescription

there is one year less than it is in this part of the province, and operates to extinguish the debt instead of merely barring the remedy, in my judgment makes no difference as to the binding effect of the law upon us.

I have no doubt as the payee of the notes carried on business in Lower Canada he often met the defendant there since the notes became due, though it was only stated in the pleadings that they met there once. And although both the maker and the payee of the notes resided in Upper Canada, yet, having entered into a contract in Lower Canada to be performed there, I cannot see that the payee of the notes has any better right to complain of that part of the law which says he must enforce his claim within five years, or it shall be considered as absolutely paid, than of that part of it which requires him to present the notes at the place in Lower Canada where they are made payable before he can recover on them at all, when, by the law of Upper Canada, a presentment to the maker himself would be sufficient. Yet there is no doubt that the defendant could set up in our courts successfully the want of presentment at the place where the notes are payable as a bar to this action if it was properly pleaded, and the notes had not been presented according to the law of Lower Canada.

I entirely concur in the judgment of the Court of Queen's Bench of this province in the case of *Hervey v. Jacques*, reported in 20 vol., U. C. Reports, at p. 366, and think there should be judgment for the defendant on the demurrer.

HAGARTY, J.—I have arrived at the conclusion (although not without much hesitation) that the defence fails. I cannot believe that the legislature intended that the 31st clause of the act relied on should have the effect of absolutely extinguishing the claim against a domiciled Upper Canadian, who made a note to another Upper Canadian in Lower Canada, and payable there, unless an action be brought within five years. Neither the maker or payee of the notes when the debt was created was domiciled in Lower Canada. My impression is, that the legislature in framing the clause

had regard to parties domiciled in Lower Canada. It seems unlikely that it could have been designed to meet the case of a dealing between two Upper Canadians like this. One owes money to the other, and in Montreal makes a note payable there, and sends, or perhaps brings, the note, the evidence of the debt, to him in Upper Canada. The payment may be to be made in Montreal for the debtor's convenience, and both parties reside, as they have always done, in Upper Canada. The words used in the section are large enough to embrace this case in their literal sense, and we have of course to consider that it is the language of our own legislature—not that of a foreign state. Our duty, however, is clearly to look beyond the letter when we find a meaning sought to be fixed on them, which we can hardly think it probable was contemplated. In a transaction between two Upper Canadian merchants, we may naturally suppose that the legislature would not, except for some very cogent reasons, have made the possibly accidental place of making, and payment of the evidence of the debt, wholly alter the relative rights of the parties and create a positive bar to a recovery by the creditor in the courts of that part of the province where a suit must necessarily be brought. It may be observed that this statute provides for no disabilities from absence, infancy, &c., &c., so that if the defendant's construction be accepted, an Upper Canadian debtor to an English creditor might intentionally send notes to him in England, dated and payable at Montreal, (as in this case,) and at the end of five years successfully defend himself in the Upper Canada courts against the just claim of a man who had never till the bringing of the action been on Canadian ground. This would be contrary to the law administered in our courts.

I am unwilling, except on the strongest necessity, to give this result to the statute. The rule of construction is very clearly laid down by *Turner*, L. J., in *Hawkins v. Gathercole*, 6 DeGex, M. & G. 1, (31 Eng. Rep. 312,) "That such last-mentioned rectories and tithes are within the words of the act, if literally construed, cannot, of course, be disputed, but in construing acts of parliament, the words that are used

are not alone to be regarded. Regard must also be had to the intent and meaning of the legislature. The rule upon this subject is well expressed in Plowden, 204: "The judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded acts which were general in words, to be but particular where the intent was particular. * * The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend to but some things, and those which generally prohibit all persons from doing an act, they have interpreted to permit some people to do it. and those which include every person in the letter, they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature which they have collected sometimes by considering the cause and necessity of making the act, and sometimes by comparing one part of the act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." * * *Turner, L. J.*, proceeds, "The passages to which I have referred, I have selected only as containing the best summary with which I am acquainted of the law upon this subject. In determining the question before us, we have therefore to consider not merely the words of the act, but the intent of the legislature to be collected from the cause and necessity of the act being made, from a comparison of its several parts, and from foreign (meaning, extraneous) circumstances so far as they can justly be considered to throw light upon the subject." *Knight Bruce, L. J.*, speaks of the propriety of reading the act "with a due degree of attention to the nature of the subject certainly embraced by it, *to the state of our institutions and jurisprudence when that act passed*, to the judicial construction that other statutes have by approved decisions received, and to the universally recognised canons by which the interpretation of laws is regulated." This case and the method of

interpretation adopted is cited with approbation in *Cope v. Doherty* before the Lords Justices, 31 Law Times Rep. 307, confirming the judgment of *Wood, V. C.*, at page 173, of same volume. The latter case is also in point as to the restrictions of general words in the Merchant Shipping Act, 1854.

The view of *Tindal, C. J.*, in *Huber v. Steiner*, already cited, adopts the condition annexed by Mr. Justice *Story*, that to allow the operation of the clause extinguishing the debt after five years, "that the debtor and creditor have remained within the jurisdiction during the term of the prescription."

I think the safest construction for the statute is either to adopt this condition as implied, or to intend that the legislature only provided for the case of debts of this description as between domiciled inhabitants of Lower Canada.

I do not consider that the statement of the holder and the defendant meeting in Montreal more than five years before action can alter the case. The allegation that he might have sued the defendant is of little consequence beside the admitted fact that they both were during all that time resident in Upper Canada. The section immediately preceding that relied on by defendant enacts thus, "And whereas it is expedient to make provision for certain particulars in foreign bills of exchange; be it enacted that all bills drawn abroad upon any person in Lower Canada, or payable or accepted at any place within Lower Canada, shall *as to all parties resident therein and liable* on such bills, be subjected to the provisions of this act with respect to days of grace for payment," &c., &c. Then clause 31 declares that all bills, whether foreign or inland, and all notes due and payable in Lower Canada shall be held and taken to be absolutely paid and discharged if no suit or action is brought thereon within five years, &c. If we import into this clause the words used just before in the preceding clause, "*as to all parties resident therein*," we would have a clear perception of the meaning of the legislature. And the clause would read that all bills, whether foreign or inland, and all notes due and payable in Lower Canada shall, *as to all persons*

resident therein, be held and taken to be absolutely paid, &c., &c. I think a full consideration of the object apparently contemplated by the legislature, and an application to such consideration of the recognized canons of construction will lead us to this method of expounding this statute. I feel strongly the difference between the application of a foreign law and a statute of our own parliament to a case like the present. But on the best consideration I can give the matter, I have arrived at the conclusion that the statute does not bar the remedy in our courts in a suit like the present.

Per cur.—Judgment for plaintiff.

RICHARDS, J., *dissentiente*.

SCRIPTURE V. CURTIS.

Ejectment—Usury—Effect of a decree in Chancery—How far evidence in a suit on a mortgage.

Usury having been set up as a defence to an action of ejectment brought on an indenture of mortgage, the plaintiff gave in evidence a decree of the Court of Chancery between him and the defendant in a foreclosure suit on the same mortgage which upheld the mortgage, and in effect declared that it was not tainted with usury.

Held, that a decree of the Court of Chancery in suit between the same parties, upon the same identical question attempted to be raised in another suit, is conclusive.

EJECTMENT for the north half of the south half of lot No. 27, B. F., concession A., Murray.

Writ tested 18th December, 1858.

Defence for the whole.

The claimant's notice of title was under a mortgage made by the defendant to the claimant. The defendant besides denying the title of the claimant, set up title under an indenture of bargain and sale from the claimant.

The trial took place at Cobourg, in March, 1861, before *McLean, J.* The plaintiff proved a mortgage given by the defendant to himself, dated 5th March, 1844, of the premises in question, subject to a proviso, for repayment of £75 on or before the 5th March, 1847.

On the defence it was proved, that at the time of the execution of the mortgage, the plaintiff advanced to the defendant £75, and immediately received back £9, being in-

terest paid for three years in advance, during the time the mortgage had to run, in addition to six per cent. per annum, which was payable by the terms of the mortgage on the £75 said to be advanced together with the £75, and so that in fact only £66 was advanced to defendant. In reply the plaintiff put in a bill filed in chancery for foreclosing the mortgage, and the defendant's answer setting up the facts proved at the trial of this cause, and the decree by which it was ordered among other things, that upon the defendant paying to the plaintiff what should be found due for principal, interest and costs, within six months after the master should have made his report, the plaintiff should re-convey to the defendant, but in default of the defendant making such payment, that the defendant should stand absolutely debarred and foreclosed of and from the equity of redemption on the mortgaged premises.

On the evidence the learned judge directed a verdict for the plaintiff, with leave to defendant to move.

In Easter term, *Hector Cameron* obtained a rule *nisi* for a new trial on the ground of misdirection, in ruling that the proceedings in Chancery were conclusive against defendant on the question of usury.

C. S. Patterson shewed cause. He cited *Henderson v. Henderson*, 3 Hare 115 ; Bull N. P. 243, *Manchester Mills case*, Dougl. 222 n. 13 ; *Place v. Potts*, 8 Exch. 705 & 10 Exch. 370 ; *Carter v. James*, 13 M. & W. 137.

H. Cameron supported the rule.

DRAPER, C. J.—The defendant in the foreclosure suit against him, set up by way of answer the very same charge of usury that he now sets up by way of defence to this action. He then endeavored to impeach the mortgage deed in order to prevent the plaintiff obtaining a decree by the very same evidence, that he now offers to impeach it, in order to prevent the plaintiff recovering in this ejectment. The Court of Chancery have, however, decreed in the plaintiff's favor, upholding the mortgage and in effect declaring that it is not tainted with usury, for if it had been then, according to the

statute in force when it was made, it would have been void both at law and in equity.

Here then is a decree between the same parties, upon the same indential question, and we are called upon to say whether the learned judge was right, when that decree was given in evidence, in directing the jury to treat it as conclusive upon that question between these parties, and to find for the defendant.

There seems to be very little direct authority on the subject. In Buller's *Nisi Prius*, p. 243-4, it is said: "A decree in Chancery may be given in evidence between the same parties or any claiming under them, for their judgments must be in authority in those cases where the law gives them a jurisdiction, for it were very absurd that the law should give them a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof," referring to the case of the *Manchester Mills*, Dougl. 222 (N. 13.) The observations of *De Grey*, C. J., in the *Duchess of Kingston's* case, and the authorities collected in the notes on that case in 2 *Smith's leading cases*, contain all that I have seen which immediately bears on this question. I do not find the law, as laid down in Buller's *Nisi Prius*, to be subsequently doubted or denied, and it appears to me fully to sustain the learned judges direction. We act upon that authority and therefore,

The rule must be discharged.

Per cur.—Rule discharged.

During this Term the following gentleman were called to the bar:—GEORGE HENRY DARTNELL, JOHN DAVISON, WILLIAM HORATIO RADENHURST, HENRY O'BRIEN, FREDERICK PROUDFOOT, WILLIAM FERGUSON, JUNIOR, WILLIAM DANIELL, NATHANIELL BALDWIN FALKNER, DUNCAN MACMILLAN, JAMES CLELAND HAMILTON, JAMES PENNINGTON MACPHERSON, JOHN ROBERT McLAREN, JOHN ANDERSON ARDAGH, GEORGE BARTHOLOMEW BOYLE, FREDERICK LAMPMAN.

TRINITY TERM, 25 VIC.

Present :

The Hon. WILLIAM HENRY DRAPER, C. B., C. J.

" " WILLIAM BUELL RICHARDS, J.

" " JOHN HAWKINS HAGARTY, J.

OGILVIE ET AL. V McLEOD.

Goods sold—Guaranty—Action against guarantor.

The defendant purchased goods from the plaintiffs with instructions to charge and send them to one Fox, which they did, and after receiving a portion of the purchase money brought this action against the defendant, claiming that he was liable as purchaser of the goods. Several letters were put in evidence written by the plaintiff to Fox, in one of which was the following passage: "It is now so long since your account was due, that there is no other resource left except to follow up Mr. McLeod, who is guarantor," and in another, "We shall place the matter in the hands of Gordon Leggatts, Esq., Amherstburg, with instructions to proceed immediately against you and Mr. McLeod for the amount."

The plaintiffs also proved that the defendant had ordered goods in the same manner from merchants in Montreal, and in some instances paid, and in others given his own notes for them.

The jury having found for the plaintiffs, the court refused to disturb the verdict.

Common counts.

Plea—Never indebted.

The trial took place at Cornwall, in May, 1861, before Burns, J. It was sworn by a former clerk of the plaintiffs, that in 1854 the defendant bought goods of the plaintiffs, £525 2s. 11d. in amount, telling the plaintiffs that they should charge the goods to one Fox, and address them to him; that Fox was getting out staves for the defendant; that Fox was wholly unknown to the plaintiffs, and that they gave the credit to the defendant, and not to Fox. Defendant had previously bought goods from the plaintiffs, and was in good credit. The goods were forwarded to Fox, and they were charged to him in the plaintiffs' book, no entry being made of the transaction by which the defendant was charged.

Afterwards the plaintiffs received from Fox tobacco and ashes, and they credited his account with £334 15s. 6d. Fox sent to the plaintiff his own notes to cover the amount of the goods. This witness afterwards spoke to the defendant about paying the amount due, and he said it would be all right.

The plaintiffs further proved that in the same year the defendant purchased goods of other merchants in Montreal, and directed them to be charged and forwarded to Fox, and as Fox failed in paying for them, the defendant, in one instance, gave his own note for the amount, and in the other endorsed a note, made by Fox, payable to himself, which was given to the creditor.

On the defence there were put in a number of letters, written by the plaintiffs to Fox, urging him to pay, in one of which (dated 27th February, 1856) is this passage: "It is now so long since your account was due, that there is no other recourse left except to follow up Mr. McLeod, who is guarantee," and in another (dated 15th July, 1856,) the plaintiffs say, "We shall place the matter in the hands of Gordon Leggatt, Esq., Amherstburg, with instructions to proceed immediately against you and Mr. McLeod for the amount." The defendant's counsel also objected to the admissibility of the evidence of the plaintiffs ordering other goods in the name of Fox, and settling for them in part.

The learned judge left it to the jury to say to whom the plaintiffs originally gave credit. They found for the plaintiffs—£279 1s. 8d.

In Easter Term, *A. Prince* obtained a rule *nisi* for a new trial, on the ground that the verdict was against law and evidence, as the credit was not originally given to the defendant, and against the weight of evidence on this point, and because the evidence respecting dealings with other parties was improperly admitted, or because, though the learned judge refused to postpone the trial on the defendant's application, he reserved leave to the defendant to move on that ground, and for leave to add a plea of accord and satisfac-

tion by the notes of Fox which the plaintiffs had received, as was proved at the trial, and upon affidavits.

The defendant's attorney made an affidavit that an application was made at the assizes to put off the trial on account of the absence of Fox, a material witness for the defence, and of one Lewis, who, as the attorney was informed, was also a material witness: that the application was refused, but the learned judge said he would reserve leave to move for a new trial on the same grounds as those then moved upon. The defendant swore the goods were ordered by him for Fox and not on his own account. That he never made any promise to pay for them directly or indirectly; that he never had any interest in the goods or in their proceeds, nor in the business of Fox nor otherwise in relation thereto, nor did he ever represent that he had any such interest; that he never paid any debts of Fox for goods furnished him, nor signed or endorsed any note or notes for his accommodation, and never became responsible for him in any way; that Fox left this province about 1856, and the defendant had ascertained he was living on North Bass island in Lake Erie; that owing to the ice he could not get Fox's evidence taken on a commission for last spring assizes; that his evidence is material for the defence, and he has no doubt he could procure Fox's evidence during the summer season; that he got the letter written by the plaintiffs, and produced at the trial, from a clerk of Fox, in April last, and then first discovered from them that the plaintiffs had taken Fox's notes for the account; that the plaintiffs never rendered any account to the defendant; that he had negotiated with the plaintiffs' attorney to refer this case, and until the 6th May last did not think it would go to trial, when it was too late to get the evidence of Fox or of his clerk; that David Lewis of Montreal was also a necessary witness, but could not be obtained in time.

An affidavit of David Lewis stated, that he was formerly in the plaintiffs' firm; that this account was charged in all their books against Fox; that he received a telegram to attend as a witness at the trial, but was unable to get to Cornwall in time.

In the following term, *J. S. Macdonald*, Q. C., shewed cause. From the affidavit filed by him it appeared that no commission to examine Fox had been taken out; that the proposal to refer failed, because the defendant would not agree to a reference, in which a merchant should be umpire, but desired that all the referees should be lawyers in Lower Canada, to which the plaintiffs would not agree; that in March last defendant abandoned a summons to put off the trial, having failed in changing the venue. An affidavit was also produced from a person not examined at the trial, positively corroborating the evidence given at the trial that the defendant purchased the goods on his own credit, but directed that they should be forwarded to Fox; and that Fox's name was used to accommodate defendant, who did not wish his name to appear publicly as connected with the store or business managed by Fox at Gosfield, as a branch establishment of defendants; and David Lewis, who had made an affidavit which was filed by plaintiffs stating why he could not attend at the trial, and stating that as to the plaintiffs' books of account, the defendant was not charged in them with these goods, made a second affidavit stating that the claim was often made by letter by plaintiffs upon defendant, and that plaintiffs drew on defendant for £229 16s., a part of the claim, and that on the 2nd of November, 1857, the debt was transferred to the debit of the defendant in the plaintiffs' books.

DRAPER, C. J.—I do not perceive that we can give any greater weight to the fact that an application was made at *nisi prius* to put off the trial, and to the leave reserved with regard thereto, than that the defendant did not speculate on the chance of a verdict upon such a defence as he then was prepared to offer, and having failed, does not come to the court for a new trial on the ground that he has a better defence.

The question to be presented to the jury remains the same as at the trial. The defendant's denial of the truth of the evidence on which the jury found against him, would not help in the event of a new trial, for he could not be a

witness, and it now appears that the plaintiff have a second witness who has deposed to the same facts which were proved at the trial, and which, if established, fully sustain the verdict.

The testimony of Fox certainly might be material; but it is very improbable that he could contradict the plaintiffs' witness as to what took place when defendant ordered the goods, and, they swear, on his own credit. And though the defendant denies any interest in Fox's business, or any liability for these goods, he offers no explanation of the circumstances under which he ordered goods for Fox, not only of the plaintiffs, but of other parties. No affidavit from Fox has been produced, and assuming that the ice on Lake Huron prevented access to him in March last, that impediment would not exist in May, when the trial took place, nor yet when the new trial was moved for, and yet up to the argument no effort appears to have been made to get from him a statement of what he can prove.

Then as to the objection to the reception of evidence, the plaintiffs were endeavoring to establish the defendant's liability for goods ordered to be sent and charged to Fox, and might, if the evidence went far enough, shew a partnership between them, or such a course of dealing as would shew that he was in the habit of holding himself liable for goods which he ordered in Fox's name. Now the evidence shewed that at the very time he gave the order to plaintiffs he ordered goods in the same way of other merchants, for which he, by making or endorsing notes, made himself liable. It is evidence of the defendant's own conduct in dealings collateral to his dealing with the plaintiffs, but strongly illustrative of the defendant's relations with Fox. I think it was admissible, though I have entertained some doubt of it. But even if it were not admissible the plaintiffs' case was so strongly established without it, that a verdict for the defendant could not have been allowed to stand. It was not a question of doubt or of inference, but a question upon which the evidence was positive, direct, and uncontradicted, and where no other result than a verdict for the plaintiffs could properly have followed. And now

we find, that additional testimony, equally charging the defendant by his own acts and directions, can be given on another trial, while it is not shewn certainly that the defendant can prove a single contradictory fact.

Under these circumstances we ought not, in my opinion, to grant a new trial.

HAGARTY, J.—I wish to add that I am strongly influenced in refusing a new trial by the noteworthy fact of defendants wholly failing to give any satisfactory or even plausible explanation of his position with regard to Fox, or the circumstances that occasioned his taking a part so very active in procuring goods for that person. The court were, I think, entitled to a very full and satisfactory disclosure from a defendant so situated as Mr. McLeod.

Per cur.—Rule discharged.

SNARE V. BALDWIN ET AL.

Lease—Covenant for quiet enjoyment—Breach of under superior authority not existing at execution of lease—How far lessor liable for.

By letters patent, bearing date in the year 1840, certain lands situate on the water's edge in the city of Toronto, were granted to one "A."; the patent containing a condition for the erection of an esplanade according to a certain plan, within three years from date thereof.

A., by indenture, demised the said lands to plaintiff, with full covenants against all the world.

In 1853, the stat. 16 Vic., ch. 219, enacted, that unless the owners and lessees should, within twelve months, erect the esplanade, the corporation of the city of Toronto should do it, and impose a special rate to defray the expense thereof; and by stat. 20 Vic., ch. 80, further powers were granted to the corporation with respect to the erection of the esplanade, among others to enter upon water lots, &c.

Under the above mentioned statutes the corporation, by their agents, entered upon the premises in question, and by filling up the space between the water's edge and the esplanade, prevented the working of the plaintiff's mill, which was the damage complained of in this suit. *Held*, that the act of the corporation being done under superior authority (the legislature) although the statute did not exist at the time of the execution of the lease, yet as the breach of covenant did not arise from the neglect, fraud or procurement of the lessor, but from the nonfulfilment by the lessee of his own covenants, the defendants were entitled to succeed.

The declaration set out a lease of certain premises in the city of Toronto, being a water lot, made by one Margaret Phœbe Baldwin to one John Mulholland. The plaintiff shewed the term (of 42 years from 1st November, 1844) to

be vested in himself by assignments, and stated that all the estate and interest of the lessor became legally vested in the Hon. Robert Baldwin, that he died and that the defendants are his executors, and set out a covenant in the lease for quiet enjoyment by the lessee, his executors and assigns, without the lawful let, suit, hindrance, denial, ouster, eviction, ejection or interruption of the lessor, her heirs or assigns, or any other person or persons whomsoever, having or lawfully claiming any estate, right, title, interest or demand of, in, or to the demised premises, by or through her or them, or by or through her or their acts, measures, consents, default, neglect or procurement, or by, from, or through any other person or persons whomsoever. Breach, that after plaintiff became assignee of the term, and possessed of the premises, and while the reversion was vested in Robert Baldwin, and in his lifetime, and during the term, the corporation of the city of Toronto had the lawful right and title (not derived under Mulholland, &c., &c.) to enter and to grant to others the right of entry upon the demised premises, and to retain possession and to disturb plaintiff in the enjoyment thereof: and afterwards and while plaintiff was possessed, the Grand Trunk Railway Company, and other persons, having lawful right from and under the corporation of the city of Toronto, (not derived under Mulholland, &c., &c.) and having full, just and perfect right to enter into the possession of the demised premises, by and with the consent and approbation of Robert Baldwin, in his life time, did enter and did rightfully put out the plaintiff from possession, and disturb and interrupt him in the enjoyment of the demised premises, and being in such possession the Grand Trunk Railway Company and other persons claiming title, and acting under the city corporation, and with the consent of the said Robert Baldwin, did fill up with earth the water lot from the water's edge southwards to the northern limit of an esplanade, of 100 feet wide, built along the bay at the southern limit of the water lot, and thereby, &c., stating the injury inflicted upon plaintiff, and the damage.

Demurrer.—1. Because it is not shewn that the corporation of the city of Toronto claimed the alleged right, through

Margaret Phœbe Baldwin, her heirs or assigns, or by her or their acts, consent, &c., 2. That it is not shewn such alleged right accrued before the making of the covenant. 3. That it is not shewn by what right the corporation, or the railway, or the other persons claiming under the corporation, entered.

Pleas.—1. That the entry, eviction, &c., &c., in the breaches charged, were not occasioned by reason of any matter or thing contained in the covenant. 3. That Mulholland, in the said indenture of lease, covenanted, that he, his executors, administrators or assigns, should, within the time, and in the manner appointed by provincial, municipal or other competent authority, at their own cost, erect, build, &c., all such buildings, matters and things on the demised premises, or in the immediate neighborhood thereof, according to the provisions contained in certain letters patent from the Crown, dated 21st February, 1840, granting, amongst other things, certain lands adjoining to the demised premises, to the city of Toronto, upon certain trusts, were or might be necessary to be erected on behalf of the said Margaret Phœbe Baldwin, her heirs or assigns, as proprietors of the demised premises, so as to entitle her or them to a conveyance of the said adjoining lands from the corporation of Toronto, according to the provisions of the letters patent. That by the letters patent, and by force of the statute 16 Vic., ch. 219, it became necessary, on behalf of the said Robert Baldwin, as proprietor of the demised premises, and in respect of the same, to entitle him to a conveyance of the adjoining pieces of land, as in the covenant mentioned, to build in front of and upon the demised premises, an esplanade, within twelve months from the 1st of January, 1853, and plaintiff did not build the same at any time, wherefore, and by authority of the said statute, and also by authority of the statute 20 Vic., ch. 80, the corporation of Toronto and the Grand Trunk Railway Company, and the said other persons for the purposes in the said acts authorised, entered upon the premises, and did the several acts in the said breach charged.

Replication, 2nd to 3rd plea, that according to the provisions of the said letters patent, it was not necessary in order

to entitle the said Margaret Phoebe Baldwin, or the said Robert Baldwin, as her assignee and proprietor of the demised premises, to erect, build, &c., any buildings, works, matters or things, either on the demised premises or in the immediate neighborhood thereof, but that by the letters patent the said adjoining lands, with other lands, were granted to the corporation of Toronto, in trust, to convey the same to the owners of the demised premises, subject to a charge thereon binding the lands; that the proprietors of the demised premises and adjoining lands would build the esplanade across the lands referred to in the third plea; that according to the letters patent, the building the esplanade was not a condition precedent to the conveyance by the corporation of the adjoining lands, but it was the duty of the corporation at once to convey the same without any erections, &c., being first made.

3rd to 3rd plea, that according to the provisions of the said letters patent, and of the stat. 16 Vic., ch. 219, it became necessary on behalf of the said Robert Baldwin, as assignee of the said Margaret Phoebe Baldwin, as proprietor of the demised premises, and in respect of the same, so as to entitle him to a conveyance of the adjoining piece of land, that an esplanade of only 100 feet in width should be built in front of and across a small portion of the south end of the demised premises, and across land covered with water to the south thereof, and that no other erection, &c., was necessary according to the conditions of the said letters patent; that the building the esplanade according to the letters patent would not and did not disturb, &c., plaintiff in the quiet possession of that portion of the demised premises in the declaration specified, and that it was not necessary in the construction of such esplanade to do the several acts in the breach charged, but that the breaches of covenant complained of were on account of the rightful disturbance, against plaintiff's consent, by the Grand Trunk Railway Company and others, lawfully claiming and having title by and under the corporation of Toronto, of the plaintiff's quiet enjoyment of that portion of the demised premises extending from the northern side of the esplanade up to the

water's edge, and not including the esplanade, and were other and different breaches and wrongs than those justified in the third plea.

Demurrer to 1st plea, because it neither denies, nor confesses and avoids the specific breaches charged. That the declaration does not allege that the breaches were occasioned by any thing in the covenant of Margaret Phœbe Baldwin, but that they were in contravention of that covenant. That the plea admits the facts stated in the breach, and only traverses the legal effect of them, and that the facts admitted were matters and things contrary to the covenant of Margaret Phœbe Baldwin.

Demurrer to the third plea.—Plea no answer, for the breach complained of is not the construction of the esplanade, but the entry by the Grand Trunk Railway Company and others having lawful title under the corporation of the city of Toronto (not derived under Mulholland, &c.,) upon the demised premises, and filling up a part, other than that covered by the esplanade, with earth, and disturbing plaintiff in the enjoyment thereof; that it is not shewn that in the construction of the esplanade it was necessary to do the acts complained of, and it appears that the esplanade was erected before the disturbance complained of in the declaration; that the covenant declared on, and the covenant of Mulholland pleaded, are independent covenants; that the justification attempted to be set up does not apply or refer to the breaches alleged.

Rejoinder.—Demurrer to 2nd replication to 3rd plea, because it does not answer the plea; because the plea justifies not only under the covenant, but also under the statutes, in the plea mentioned.

Demurrer to 3rd replication to 3rd plea, that the replication only answers so much of the 3rd plea as justifies under the covenant of the lessee, and the stat. 16 Vic., but leaves unanswered the justification under the stat. 20 Vic., that the replication admits the justification as to that part of the premises included in the esplanade, to which part only the replication applies.

Joinder in demurrer.

Harrison for plaintiff.—The covenant is in the most general terms, against the acts of every person lawfully claiming any right or interest in the premises.

It is unnecessary that the right of the corporation of Toronto to enter should be shewn, *Foster v. Pierson*, 4 T. R. 617, (*Hodgson v. E. I. Company*, 8 T. R. 278); nor need it be shewn that such right existed when the lessor entered into the covenant. *Buckley v. Williams*, 3 Jur. 325; *Skinner v. Kilbys*, 1 Show. 70; *Wotton v. Hole*, 2 Saund. 181, note 10; *Jordan v. Twells*, *CANON TEMP. HARDW.* 172; *Brooks v. Humphreys*, 5 Bing. N. C. 55. The declaration shews that the Grand Trunk Railway, and other persons, entered by authority of the corporation of Toronto, and their title is sufficiently shewn.

The first plea contains no answer to the declaration, it only alleges that the eviction, &c., were not occasioned or suffered by reason of any thing the covenant of Margaret Phoebe Baldwin contained. Granted that it is so, yet the covenant which is for quiet enjoyment, against the acts of all persons, is broken by what is charged, and so the plea is no answer.

As to the 3rd plea, in *Lyman v. Snarr*, 9 C. Pl. 104, the court held that this plaintiff, who was lessee of Lyman, was bound to pay rent according to his covenant, although he pleaded that the city of Toronto had, under the 20th Vic., ch. 80, filled up the water lot leased with earth, and prevented him from working his mill thereon. *Shaw v. Stenton*, 2 H. & N. 858; *Fischell v. Scott*, 15 C. B. 69; at least it is explained. See *Hale v. Rawson*, 4 C. B. N. S. 85; *Schilizzi v. Derry*, 4 E. & B. 873, shew only that when a man engages to do a particular act, unless prevented by specified exceptions, the temporary existence of the prevention does not discharge him from his engagement. Then the power to build the esplanade does not include the filling in the rest of the land, and the two statutes, or the latter one, 20 Vic., ch. 80, sec. 5, makes the filling up a charge on the lands, not on the occupants.

A. Wilson, Q. C., contra, contended that as the plaintiff, in the third replication to the 3rd plea, restricted his claim

to the filling up the lot between its northern boundary and the esplanade, such restriction was in effect a discontinuance. He argued that it was not enough to aver that the corporation of the city had lawful title, not derived from the plaintiff, *i. e.*, a lawful title shewn to have been created before the lease to the plaintiff; but it is not averred the title was derived from defendant. 2 Saund. 180, n. 10.

Plaintiff, as assignee of Mulholland, was bound to erect the esplanade, within a year after the passing of 16 Vic. Owing to his not fulfilling this covenant in the lease of which he was assignee, the provisions of 20 Vic. become applicable and afford a justification to the corporation to do or authorise to be done the acts complained of. The plaintiff asserts certain things were not necessary under the letters patent, but how can the court judge of them when they are not set out. The first plea, perhaps, cannot be entertained, but the third is good. The principal point is, whether under a general covenant for quiet enjoyment like the present, there being nothing in existence then inconsistent with the conveyance to the covenantee, a matter subsequently originating, which causes disturbance to plaintiff, gives him a right of action against the covenantor. *Reid v. Hoskins*, 4 E. & B. 979; *Melville v. DeWolf*, 4 E. & B. 844; *Rawle on Covt.* 187, 188; *Dudley v. Folliott*, 3 T. R. 584.

DRAPER, C. J.—The principal question is whether the third plea answers the breach of covenant charged in the declaration. Considering the two statutes relied upon by that plea, and so much of the letters patent as the plea and those statutes set forth, it appears to me the corporation of Toronto had lawful right to enter on the demised premises, and to authorise others to enter and do the acts charged as constituting the breach of covenant, and the plaintiff himself asserts, and the defendants do not deny, that such lawful right existed. The right to enter and make the esplanade and the right to enter upon and fill up the water lot, rest upon distinct grounds, the one precedes, the other is created after the execution of the lease set forth in the declaration, and the alleged breach of covenant is declared in the replication to the third plea to consist in the exercise of this later right.

And it could not well be otherwise when we observe that according to the letters patent as set out in the preamble to the 16 Vic., ch. 219, the erection of the esplanade in front of the water lot, would entitle the owner thereof to a conveyance of an extension of the water lot, as described in a map annexed to the letters patent, and also to a conveyance of other land specified. Margaret Phoebe Baldwin, as such owner leased to Mulholland under whom the plaintiff derives his title, and Mulholland covenanted to build the esplanade; but according to the letters patent, the esplanade should have been erected within three years from February, 1840. But no esplanade was even begun in 1853, when the statute 16 Vic. enacted that unless the owners or lessees of the different water lots should, within twelve months erect that portion of the esplanade fronting upon or crossing their respective premises, the corporation of Toronto should do it, and that corporation was empowered to impose a special rate to defray the expense of such erection by that body.

In 1857, the act 20 Vic., ch. 80, was passed, which recites that under the former act the corporation of Toronto had contracted with the Grand Trunk Railway Company to build an esplanade in front of the city, and that it had become necessary *to grant further and other powers* to the corporation to enable them to complete the esplanade according to the contract, and certain other work connected therewith, and in addition to authorising the construction of the esplanade, and the entry upon all lands and water lots, and the crossing all wharfs, docks, piers and premises lying within the limits of the esplanade, this act further empowered the corporation to contract for filling the whole space between the northern limit of the esplanade and the shore of the bay of Toronto, and for that purpose to enter into and upon all water lots, &c. The expense of filling up, &c., was to be repaid to the corporation by the owners or other persons having estates in the land on which the grading, levelling, and filling in shall be done.

The alleged breach of covenant therefore appears to consist in this—that the legislature, after the lease to Mulholland, who had not erected the esplanade in front of the

demised premises according to his covenant, conferred powers on the corporation of Toronto to interfere with the private rights both of lessor and lessee, and their respective assignees; that the corporation exercised these powers and thereby disturbed the plaintiff in the quiet enjoyment of this water lot. That the act of the corporation was lawful, being done under an *authority* paramount to the lessor, though exercised after the making the lease, and that this is analogous to an entry by *title* paramount, and therefore the defendants as executors of Robert Baldwin, in whose lifetime and possession of the reversion these acts were done, are liable to the plaintiff.

The declaration expressly negatives that the corporation of Toronto derived their title by, through or under the lessee or any subsequent assignee, and is not therefore open to the objection that it was matter of doubt whether the corporation did not derive their title in that manner. (See *Noble v. King*, 1 H. Bl. 35; *Brookes v. Humphreys*, 5 Bing. N.C. 57.) But the plea discloses what the title of the corporation was—shews that it is derived from the exercise of a superior authority, not from a prior or paramount title, and that it accrued after the lease to Mulholland was executed. It asserts in fact that the disturbance of plaintiff's possession was under the authority of the two statutes, and especially of the latter, and thus confesses the disturbance, but seeks to avoid the breach of covenant charged. And if the law be, as I understand it, from the case of *Walton v. Hele*, 2 Wm. Saund, 177, and the authorities referred to in note 10 to that case, that in order to constitute a breach of this covenant the lawful title under which the act complained of was done must have existed before or at the time of the lease, the plea is a good answer, admitting that the declaration is sufficient.

Looking at all these pleadings, it appears clearly to me that the lawful right exercised by the corporation of Toronto, and those who acted under them, did not exist when the covenant declared upon was entered into; and so far as the statute 16 Vic. is concerned, the exercise of the powers granted to the corporation was contingent on the fulfilment or non-fulfilment

by Mulholland of his own covenant set out in the third plea. Both statutes proceed from the supreme authority, the legislature; and I do not see how it can be said from any thing that appears on the pleadings, that the exercise of that authority was brought about by or through the acts, measures, consent, default, neglect or procurement of the lessor or of Robert Baldwin. If what the plaintiff contends for be correct, then it would appear to follow that wherever the legislature have granted a charter to a railway company, with the usual powers to enter and take lands, the exercise of these powers will cause a breach of covenant on the part of lessors or former owners of such lands, who, prior to the granting of the charter, have leased or conveyed with a general covenant for quiet enjoyment. Such a covenant, however, is intended as an indemnity against the acts of particular persons: that is, of those having lawful title before the covenant was entered into. It is not a covenant to do some specific act or acts. And if it be conceded as the language used by Sir *N. Tindal*, in *Evans v. Hutton*, 4 M. & Gr. 968, tends strongly to shew that a contract may be dissolved by superior authority, so that the contractor is relieved from performance, I do not see why the act of the legislature in this case may not equally relieve the covenantor from indemnifying his lessee. If after the letters patent and the lease to the plaintiff, an act had been passed prohibiting the erection of the esplanade, there is, I apprehend, no doubt that the plaintiff would have been relieved from his covenant to erect it, and it appears to me the defendants should be equally relieved from indemnifying against acts lawful, because done under powers given by the legislature, and which acts, if not so legalised, would not have constituted a breach of the lessor's covenant for quiet enjoyment.

I think the defendants are entitled to judgment on this record.

Per cur.—Judgment for defendants.

MICKLE V. OLIVER ET AL.

Witness—Party to a suit called as such—Credibility of—Right of Jury to form a contrary conclusion.

Plaintiff, payee and first endorser of a note sues a subsequent endorser, and calls him to prove the replication that he endorsed with the intention to become liable to plaintiff as endorser and surety for maker, &c. &c. Defendant expressly denies this, There being no other evidence, *Held*, that there was nothing to go to the jury to warrant a finding for plaintiff.

DECLARATION on a note by Oliver and McNeely, to one C. Mickle or order, endorsed by Mickle to defendant Dent, and by him to defendant Stoney, and by Stoney to the plaintiff.

The defendant McNeely suffered judgment by default for non-appearance, and defendant Oliver by default of plea.

Plea by Dent.—1st. Denial of notice. 2nd. Satisfaction by delivery of the note to the plaintiff, by the same makers, endorsed by Dent.

Plea by Stoney that the payee of the note is the plaintiff who endorsed the note to Dent, and so the plaintiff is liable to Stoney thereon. 2nd. Denial of notice. 3rd. Satisfaction same as Dent's second plea.

Plaintiff took issue on all these pleas except Stoney's first plea, to which he replied, a sale of lumber to Oliver and McNeely, who agreed to pay a good endorsed note: that they accordingly made the note: that Dent and Stoney for the makers' accommodation severally endorsed the same to the plaintiff, and that they so endorsed it with the intention of becoming liable as sureties as endorsers to the plaintiff, and the makers delivered it so endorsed to the plaintiff under the agreement, and plaintiff gave the goods in consideration of the note and endorsements; that no part of the value was paid, and no consideration for his, plaintiff, endorsing to Dent or Stoney, but he so endorsed after it was so endorsed by Dent and Stoney, and delivered to him by the makers to give him title thereto, and to sue defendants Dent and Stoney thereon.

On this replication Stoney took issue.

The trial took place before *Draper*, C. J., at Stratford.

Defendant *Stoney* was called for the plaintiff and swore he endorsed at the request of the plaintiff's brother, who as-

sured him he ran no risk as the plaintiff's name must be before him, and it was for his accommodation. Afterwards he came again, saying that plaintiff did not wish to endorse this note, and wanted witness to endorse a note of the same makers, payable to defendant Dent, or order, which he refused, not being willing to endorse for their accommodation. When he endorsed the present note he had not heard of any dealings between the plaintiff and the makers. In March, 1858, the plaintiff called on him, said note was not paid, and he would look to him; thinks it was about the 10th March the fire took place, when plaintiff's brother-in-law was burned out. It was just before the fire that plaintiff spoke to him; saw plaintiff two or three days after the fire at his brother's funeral.

Dr. *Hyde* swore that the plaintiff came up from Guelph in the latter end of January, 1858, six or eight weeks before the fire; is sure the last witness is wrong as to the time when the plaintiff came up to Stratford; witness went with the plaintiff to his brothers; they spoke about the note and then went to Stoney's, witness going elsewhere. Soon after, on his return, he saw plaintiff and Stoney together. Plaintiff always stopped with witness, and was not up from that time till the fire. After he thus saw them together he went with the plaintiff to Dent's house; he was out; plaintiff told his wife he wished to see him about a note due to him, and to tell Dent when he returned that the note was due; she said she would; thinks he gave her to understand it was a note endorsed by Dent and Stoney, due that day; plaintiff had a paper, which witness took to be the note, with him; witness inferred that the makers had not paid the note; that Stoney, he believed, knew that the plaintiff was in good circumstances in large business. Plaintiff said to witness as he was going, now we will go and give the same notice to Mr. Dent.

It was objected that there was no evidence of notice to either Dent or Stoney, and that the plea of accord was proved.

On the subject of notice the law was correctly explained to the jury, and the issues left to them. As to Stoney's

plea, the jury were asked if Stoney endorsed intending to make himself liable as surety for the makers, or if he endorsed for plaintiff's accommodation, not intending to make himself liable to plaintiff in any event, and that the plaintiff's prior liability would be a guarantee to him against his being liable to the holder, and the jury to consider that the plaintiff took the note on a real transaction—that he wanted security to be paid, and that his position as a man in good circumstances was apparently such that his own endorsement would suffice to get a discount for a note of £52 10s. without Dent or Stoney's endorsement.

The jury found all the issues for plaintiff.

In Easter Term, *Kingsmill* for Stoney, moved to set aside the verdict both as to notice and on the evidence urged to support the replication.

C. Robinson shewed cause.

HAGARTY, J.—As to the finding of the jury on the issues as to notice and satisfaction, I see no reason to induce the court to interfere. The proof of notice was not very clear or satisfactory, but there was some evidence which was properly submitted to the jury, and they have found for the plaintiff.

The case of *Leith v. O'Neill and Carroll*, 19 U. C. 233, cited by Mr. *Robinson*, is much in point on this head. But the grave objection to plaintiff's recovery is on Stoney's first plea. The plaintiff confesses that he is payee and first endorser, and that *prima facie* he cannot recover. The whole burden is, therefore, on him to prove his replication against the legal terms of the note. To make this proof he relies solely on the evidence of Stoney, whom he produces as his witness. Stoney in direct terms denies this, and insists that he endorsed the note to accommodate the plaintiff, and not the makers, and that it was on the express representation of the plaintiff's brother, since deceased, that by such endorsement he had the plaintiff to look to. On other points of his evidence as to notice, &c., he is contradicted; but in proof of the replication his evidence stands alone, and is directly

against the plaintiff. The latter, therefore, seems to be in this dilemma; if his witness is worthy of belief, the replication is completely disproved—if he be unworthy of credit, there is no evidence whatever to enable the plaintiff to go beyond the legal effect of the note. The only evidence of the plaintiff, besides that of Stoney, on this head, was, that he, plaintiff, was a man not likely to require an endorser on a note for his own accommodation.

I do not see how it is possible to hold that there was any evidence to prove the replication, and that therefore the issue should not have been left as an open question to the jury, and that there must be a new trial as to the defendant Stoney, without costs.

If the plaintiff elect to discontinue on payment of costs as to Stoney, he may do so, and retain his verdict as to the other defendant.

Per cur.—Rule absolute.

TURNER ET AL. V. MILLS ET AL.

Chattel Mortgage.—As security against endorsements or contingent liabilities—Delivery—Change of possession—Accruing of debt within one year.

Held, that a chattel mortgage given to secure the mortgagee against endorsements or contingent liabilities, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession, must be registered, and the liability for which it is given must accrue due within one year from its date.

INTERPLEADER to try whether certain goods taken in execution by the sheriff of Northumberland and Durham under a *fi. fa.*, delivered to him on the 8th November, 1860, for having execution of a judgment recovered by the defendants in an action against Dalton Ulliyott, were at the time of the delivery of the writ to the sheriff, the property of the plaintiffs as against the defendants.

The trial took place at Cobourg in March last, before *McLean, J.* The plaintiffs put in a chattel mortgage, dated 19th May, 1858, made between Dalton Ulliyott, of the first part, and the plaintiffs of the second part, which recited that the plaintiffs had endorsed the promissory notes of Ulliyott for \$2600, for Ulliyott's accommodation, setting out the two

notes, one for \$1200, the other for \$1400, payable at two months after date, dated respectively the 1st April and the 19th April, 1858, and that Ulliyott had agreed to give the mortgage to indemnify the plaintiffs from payment of the said notes, or either of them, or any note or notes thereafter to be endorsed by the plaintiffs for Ulliyott's accommodation by way of renewal for the said notes or otherwise howsoever, and granted, &c., all and singular, the goods, chattels, furniture, and household stuff thereafter particularly mentioned and expressed, and then enumerated various things, as "one rosewood piano, one piano stool, one hair-seated rocking chair," and various other articles of household furniture; one waggon, one buggy, one cutter, one set of harness, one grey horse, nine years old; twenty cords of firewood, one fire-proof safe, one desk, one cow, yellow and white, about four years old.

Habendum, &c., to the plaintiffs', provided that if the defendants should pay "the said promissory notes, and every other note or notes which may hereafter be endorsed by the plaintiffs," for the accommodation of the defendant by way of renewal of the said notes or otherwise howsoever, and indemnify the plaintiffs from all loss, &c., in respect of the said notes, then the mortgage was to be void. A renewal of this mortgage was duly filed on the 19th May, 1859, for the amount of the second note, \$1400, that for \$1200 having been retired by Ulliyott. On the 10th of May, 1860, a second renewal was filed for \$600, the liability of the plaintiffs being reduced to that amount. In October, 1858, the amount for which the plaintiffs were liable for Ulliyott, was reduced to \$1800, for which one promissory note was given. In May, 1859, the amount due was \$1400, and in May, 1860, only \$600, and at the time of the trial only \$250 remained due, for which there was an outstanding note dated 25th January, 1861, payable at two months. The furniture in question was in Ulliyott's dwelling house; it had been sold by the sheriff and the proceeds paid into court. The other things mentioned in the mortgage had been previously disposed of. Ulliyott had no other property of the same description as that mentioned in the mortgage. All the notes

but the last had been retired by Ulliyott himself. The furniture had never been out of his possession until the sheriff seized it. The sheriff had a copy of the chattel mortgage, and expected to find the furniture therein mentioned at Ulliyott's residence in Port Hope, in which town he had lived nine years, and the furniture was seized in Mr. Ulliyott's house.

For the defendants it was objected that the mortgage was not in accordance with the fifth section of the chattel mortgage act. The original notes payable at two months were retired, and the renewal notes, for the last of which the security was claimed, continued the plaintiffs' liability more than two years, while after one year expired the goods could be no longer bound by the mortgage; then the description of the goods was insufficient.

Leave was reserved to move to enter a nonsuit on these objections, and a verdict was rendered for the plaintiffs.

In Easter Term, *C. S. Patterson* obtained a rule nisi to enter a verdict for the defendants, pursuant to leave reserved, on the grounds that the mortgage was void, for not setting out fully the terms, nature and effect of the agreement for securing the plaintiffs against the endorsement of the notes, in respect of which their liability existed at the time of the delivery of the writ to the sheriff, and because the liability of the plaintiffs as endorsers was extended for a much longer period than one year from the date of the mortgage, and for want of a sufficient description of the goods mortgaged.

In Trinity Term, *Hector Cameron* shewed cause. He cited *Fraser v. The Bank of Toronto*, 19 U. C. Q. B. 387.

C. S. Patterson, contra, insisted the mortgage was void. If the original liability existed, it was extended beyond a year from its creation. If the present liability was a new one, then the mortgage is satisfied, for it does not cover the existing debt, and the old one is extinguished. He renewed the objection to the insufficiency of the description.

DRAPER, C. J.—The statute (Consolidated Stat. U. C., ch.

45, sec. 5) enacts that in case of a mortgage of goods for securing the mortgagee against the endorsement of any bills or promissory notes, or any other liability by him incurred for the mortgagor, not extending for a longer period than one year from the date of such mortgage, and in case the mortgage is executed in good faith, and sets forth fully by recital or otherwise, the terms, nature, and effect of the agreement, and the amount of liability intended to be created, and in case such mortgage is accompanied by affidavit stating certain facts, and in case such mortgage is registered as the act provides, the same shall be as valid and binding as mortgages mentioned in the preceding section. With regard to the preceding section, it may be remarked that its form of expression is not to make a mortgage of chattels valid and binding, but to declare that unless the provisions of that section are complied with, the instruments therein mentioned shall be absolutely void.

This section applies to mortgages given to secure or indemnify against liabilities incurred by the mortgagee for the accommodation of the mortgagor, and which liabilities do not extend for a longer period than one year from the date of the mortgage, and it requires the terms, nature, and effect of the agreement, and the amount of the liability to be created to be set forth therein.

Taken in connexion with the previous section it would seem, 1st, that a mortgage of chattels intended to secure the mortgagee against such contingent liabilities, and unaccompanied by immediate delivery and actual and continued change of possession would be void against creditors unless registered, and even then, 2nd, that it is only a valid and binding security for those liabilities which would be due within twelve months from the date of the mortgage which are sufficiently set out or referred to therein, and which the mortgagee has been obliged or is left liable to satisfy.

This instrument (the statutory requirements as to filing having been complied with) was a valid security against the two promissory notes set out in it, and also against any renewal or other notes substituted for those two, which would fall due within a year from its date.

Upon the evidence, I assume that not only the two original promissory notes, but any and every renewal of them which fell due within a year from the date of the mortgage, were paid and satisfied by the mortgagor, and that the only liability of the plaintiff for the mortgagor arising out of this transaction at the commencement of this action, was on a promissory note for \$250, made after the expiration of the year, and which last mentioned note was dated 25th January last, the interpleader issue bearing date on the 31st of the same month; or referring to the time of the delivery of the *f. fa.* to the sheriff, and his seizure of the goods, *i.e.*, 8th November, 1860, that the plaintiffs' liability was on a promissory note for \$600, either made or falling due long after the expiration of the year.

In this view, the mortgage is not shewn ever to have become absolute by any default, in payment of either of the notes mentioned in it, or of any renewal of the same or either of them, which renewal fell due within a year from the date of the mortgage, and in that case the re-filing of the mortgage, by filing a copy according to the 8th section of the act, was inoperative, as the object and purpose of this mortgage must be taken to have been fulfilled by the satisfaction of every liability for which, according to the statute, it could be a valid and binding security. It could not, for obvious reasons, be a security for a newly created liability.

On this ground, I think the rule must be made absolute to enter a verdict for the defendants. As to the insufficiency of the description it is unnecessary to rest any thing upon that, though the case of *Fraser v. The Bank of Toronto*, 19 U. C. Q. B. 387, upon which we have acted, would so far as the household furniture is concerned, and nothing else is in question, seem decisive in the plaintiffs' favour.

Per cur.—Rule absolute.

THE BISHOP OF TORONTO V. CANTWELL.

Ejectment—Notice of intention to proceed—Necessary when four terms have passed without any steps having been taken.

Held, that one month's notice of intention to proceed is necessary in ejectment as well as in other actions, when four terms have passed without any proceedings having been taken.

M. C. Cameron, in Easter Term, obtained a rule *nisi* to set aside the notice of trial, trial and verdict in this cause for irregularity, with costs, issues having been joined more than four terms, and no term's notice of intention to proceed having been given, or for a new trial on the merits.

The affidavits stated that the writ in this ejectment suit was served on the defendant in the latter end of February or beginning of March, 1859, and an appearance was entered on the 14th of March, 1859; that no notice or proceeding of any kind was served or taken in the cause from the last date, until the 9th March, 1861, when notice of trial was served for the then next ensuing assizes at Guelph. That on the 25th of March, 1861, notice was served on the agent of the plaintiff's attorney, that if the trial was proceeded with, application would be made to set aside the proceedings for want of a term's notice, and that no such notice had been given; that the plaintiff proceeded to trial and obtained a verdict; that the defendant's attorney caused the defendant to be written to, informing him of the service of notice of trial, directly after such notice was served. The defendant swore he never received this letter; that he only became aware the cause was entered for trial by being casually in Guelph on the first day of the assize; that he was not prepared to defend, and that no defence was offered, and that he had a good defence on the merits as he verily believed, stating that he and his father, under whom he claimed, had been about 27 years in possession, occupying, clearing and improving.

In Trinity Term *N. Kingsmill* shewed cause on affidavits, that the notice not to proceed was not served until after the opening of the assizes at Guelph; that the verdict would have been taken on the first day if the defendant had not expressed a desire to have it put off till the arrival of his

counsel; and on the following day the verdict was taken, the defendant's counsel being in court but not appearing. On the question of merits an affidavit was filed, setting out a letter dated in 1846, from defendant, according to which he desired to purchase the land from the Church Society of the Diocese of Toronto, for whom the plaintiff holds this land as trustee. *Hagarty, J.*, referred to *Scrope v. Paddison*, 4 L. T. N. S. 254 (4th May 1861.)

M. C. Cameron distinguished *Scrope v. Paddison*. The objection here is, that a term's notice has not been given. The English rule No. 176 of Hilary Term, 1853, has not been adopted by our courts, and consequently the old practice remains. He referred to *Tyre v. Wilkes*, 2 Prac. Rep. U. C. 265.

DRAPER, C. J.—The case of *Doe on the demise of Vernon v. Roe*, 7 A. & E. 14, establishes that the practice of requiring a term's notice of intention to proceed, when there had been no proceeding for a year, applies to ejectments as well as to any other kind of action, and the case is the more remarkable since the tenant had not even appeared, and the parties to the record as it stood were fictitious. The plaintiff John Doe being one and the defendant Richard Roe, the other. Still on the tenant's application a judgment against the casual ejector was set aside for want of a term's notice. I confess I have not been able to understand why the rule should not apply to actions of ejectment as well as to any other actions. The reason of the rule requiring a term's notice, viz., to prevent any surprise on the defendant after the plaintiff has laid by four terms or a year without proceeding, is as applicable to ejectments as to other cases.

I do not understand the statement of counsel in *Scrope v. Paddison*, that in ejectments under the old practice, the plaintiff was out of court if there was no step taken for two years. I do not find the practice so laid down in any authority or book of practice that I have been able to consult, and I have never met with any instance of such a practice obtaining. With regard to the difference in the proceeding since the Common Law Procedure Act, it is true

there is now no declaration, nor yet any plea, but after appearance the writ and appearance are in effect substituted for declaration and plea, an issue is made up upon the writ and appearance, and the statute defines what question the jury is to try. A special verdict may be given, a bill of exception tendered, and judgment may be entered on the verdict, and costs taxed for or against either party. In that case *Pollock, C. B.*, merely decided that a commission to examine witnesses might go, although a month's notice of intention to proceed had not been given, and this may have been on the ground that the granting a commission is not a step in the cause towards the attaining judgment, it is a collateral proceeding like issuing a subpoena; or, which I incline to view as the best reason for the decision, that the objection of the defendant's counsel was that the plaintiff had not declared within a year after the service of the summons, and therefore he was out of court, which objection might be conclusively answered by remarking that the rule could not apply to ejectments since the Common Law Procedure Act, because the writ itself was substituted for a declaration as soon as the defendant put in an appearance, which that statute makes equivalent to a plea. In these suggestions, however, I am speaking for myself only.

I confess I see no reason why the case of *Doe Vernon v. Roe* should not still govern us, and as nothing is specifically settled upon this point either by statute or our rules of court, we think we should adhere to the old practice, which has been heretofore in accordance with that case.

We decide, therefore, this rule should be made absolute, costs of the application to be costs in this cause.

Per cur.—Rule absolute.

ALEXANDER MACDONALD V. RONALD McDONALD.*Survey—Boundary line—Numbering of lots—Application of statute.*

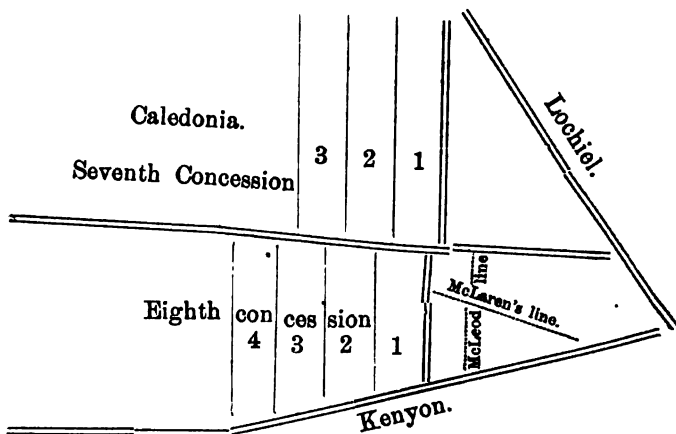
Two surveyors being employed to divide the gore of land marked in the plan below (in the statement of case) ran lines as are therein dotted and named McLaurin's and McLeod's lines. The parties apparently acquiesced in the McLeod's line for a time, but subsequently disagreed and this action was brought to contest the division.

Held, that the rule in the statute, that the course of the boundary line in each concession, on that side from which the lots are numbered shall be the course of the division or side line, not being applicable to the case, as these lots purport to number from the east, while the gore at the east of the concession is not numbered, the defendant is entitled to recover.

EJECTMENT for that part of the west half of the gore lot, 8th concession Caledonia, lying between the division line of the east and west halves of the said lot, run by one Peter McLaurin, and a line run by one Alex. McLeod, on the west side of the line run by Peter McLaurin, for the division line between the east and west halves of the lot. Defence for that part which lies east of the line run by McLeod, which line the plaintiff, and one Mary McLeod, to whom the plaintiff then conveyed, agreed should form the boundary between the east and west halves of the said lot, and the defendant defends for that part as part of the east half of the gore lot.

The case was tried at L'Original in May, 1861, before Burns, J.

It appeared that the eighth concession of the township of Caledonia is bounded on the east by the township of Lochiel, and on the south-east by the township of Kenyon, as shewn by the plan.



McLaurin surveyed this gore in October, 1860, and measured its contents at $213\frac{1}{2}$ acres; he divided it by running a line parallel to the eastern boundary of the township in the eighth concession, *i. e.*, the boundary between Caledonia and Lochiel. There was also a gore in the 7th concession. Lot number one, in each of these concessions, lies immediately on the west of each of these gores, and the lots number on to the west. The west boundary of Caledonia is a proof line and the lots in the eighth concession are numbered according to that. By his survey, the house and barn previously occupied by the defendant were found to be on the west half, and would consequently belong to the plaintiff. Both McLaurin and another surveyor swore they treated this as an exceptional case, not falling within any rule established by law, but they both thought McLaurin had followed the correct mode to divide this gore.

It was admitted that the plaintiff was at one time seized in fee of the whole gore, as heir at law to his father. On the 30th September, 1846, he conveyed the east half, calling it an equal half, to his mother Mary Macdonald, and she afterwards conveyed to defendant. The house, in which the defendant was still living at the time of the trial, was that which the plaintiff and defendant's father had occupied during his life, and the plaintiff lived there until he built another house, to which he removed with his wife, and left the defendant and his mother in the old house. She stated that she did not agree very long with defendant, and for some time she lived with plaintiff, but that she was now living with defendant to whom she had not spoken much for the last four years. She said it was understood between her and the plaintiff that if he recovered in this suit, and the defendant was turned out of possession, she might remain in the old house if she liked. The plaintiff, it appears, had been living in the new house twelve or thirteen years, and the mother stated she had lived four years with him. She swore that when she got the deed from plaintiff to herself it was understood the line was to be run as McLaurin did afterwards run it.

McLeod was not a licensed surveyor, but in 1847 (the year after the plaintiff conveyed to his mother) McLeod was called

on, as he swore, by the parties to divide the gore; he found the plaintiff and his mother there, not the defendant. He said he found an original post in front of the gore, but did not take it as a guide, because the parties instructed him to make an equal division. There were then two houses on the gore, and as he divided the gore, one house was on the east the other on the west half. The plaintiff was with him and was satisfied, and afterwards he cut timber up to McLeod's line, apparently treating it at that time as the boundary. According to McLeod's testimony the defendant would lose £200 or £300 if McLaurin's line were established.

The learned judge asked the jury to say whether the plaintiff agreed to the division line made by McLeod, and they found that the plaintiff assented and agreed to hold by McLeod's line, and the learned judge then directed a verdict for the defendant, with leave to the plaintiff to move to enter a verdict for him if the court should consider that, notwithstanding the finding, McLaurin's method of making the division would legally govern the case.

In Easter Term, *S. Richards*, Q. C., obtained a rule *nisi* to enter a verdict for the plaintiff pursuant to leave reserved, or for a new trial, the verdict being against law and evidence, and for misdirection, on the ground that McLaurin's line having been run parallel to the eastern boundary of the township from which side the lots numbered, was the proper line; that the evidence shewed the previous understanding of the parties that the lot should be so divided; that otherwise the deed from the plaintiff is void for uncertainty, as it conveys only the east half, and there is no method provided for ascertaining what the east half is; that the alleged consent to McLeod's line by the plaintiff being verbal only, could not defeat his right to recover, and it was a misdirection to tell them that plaintiff's agreement to McLeod's division entitled the defendant to a verdict.

In Trinity Term, *J. S. Macdonald*, Q. C., shewed cause. He referred to *Lord Waterpark v. Fennall*, 7 H. L. 650; *Taylor on Evidence*, sec. 1082.

S. Richards, Q. C., *contra*, without contending that the case fell within the statute regulating surveys, argued that by the

mode of division adopted by McLaurin, the lot was more truly divided into an east and west half, and that the eastern boundary of the lot must be considered as the line by which such a division should be governed; that plaintiff being entitled to the whole lot by inheritance, the defendant had to shew what was conveyed away, and if the deed was too uncertainly expressed to shew this, the plaintiff must prevail.

DRAPER, C. J.—It cannot, I think, be disputed, that if any surveyor had been called upon to divide any one of the numbered lots in this eighth concession, he would have run a line parallel to that run by McLeod, and not to that run by McLaurin, that is assuming (what has not been questioned) that McLeod's line is in truth on the same course as the side lines run at the original survey of the township. None of them are parallel to the eastern boundary of the township, and McLaurin stated in his evidence that the west line of the township was a proof line, and the lines in the eighth concession were described according to that, by which I understand him to mean that the course of these side lines is the course of this proof line. In this respect the general rule laid down in the statute, namely, that the course of the boundary line of each concession on that side from which the lots are numbered shall be the course of the division or side lines, does not apply, for it is added, provided such division or side lines were intended on the original survey to run parallel to the said boundary, and such, according to the evidence and the certified plan from the office of the Commissioner of Crown Lands, was not the intention in this case. And indeed it might be said that in this case the lots are not numbered from the eastern side of the township, that is, that the lot adjoining the eastern side of the township, is not numbered at all. The plan I have referred to shews that the township is by no means regularly shaped in the 7th and 8th concession. The course on the east is marked S. 25° E., but this does not extend quite so far as to the front of the 7th concession, where the course changes at once to a far more easterly direction, while on the west side of the township, where the proof line is, the course given is S. 25,° 10' W. But there

is a clause in the act, that if any proof line intended to be parallel to the division or side lines between lots was drawn in any concession in the original survey, the division or side lines between the lots therein shall be drawn parallel to such proof line.

It is for this reason, I say, that to divide any of the numbered lots into an east and west half, the dividing line must have been drawn parallel to the side lines of the lot, which were in their turn governed by the proof line. A deed conveying the east or west half of either of the numbered lots would not be held void for uncertainty, for the division could and would be readily made by reference to the established proof line.

I do not perceive upon what principle we could hold that a deed of the east half of this gore can be held void for uncertainty, when the western side line of this gore is fixed by the same proof line, such western side line being the eastern limit of lot number one, and nothing more being required than to give an equal quantity to each; analogy (at least) to all the other lots, if not the application of the rule given in the section of the statute above quoted, would clearly point to making the division line on the same course as would necessarily be followed in order to find the east half of every other lot in the same concession.

So far as the supposed intention of the parties can have any influence, I think the weight of evidence is in favor of McLeod's division. This was made about a year after the deed from the plaintiff to his mother, and the evidence shews it was then acquiesced in. I should rely more on this than on the mother's evidence given so many years afterwards, and after her quarrel with the defendant.

I think the rule should be discharged.

Per cur.—Rule discharged.

IN THE MATTER OF GEORGE MICHIE AND THE CORPORATION OF THE CITY OF TORONTO.

Held—1st. That an ordinary lease containing the words “and to pay taxes,” covers a special rate created by a corporation by-law as well as all other taxes.

2nd. A by-law should state a day on its face when it shall take effect, and should not require extrinsic evidence to be looked for to ascertain that fact.

3rd. The Municipal Institutions Act authorises the clerk of the council to “examine and finally determine” whether petitions are in conformity with the provisions of that act, and a certificate being given by the clerk, the court has no power, except in a case of fraud or *malafides*, to interfere.

In Easter Term *R. A. Harrison* obtained a rule calling on the corporation of the city of Toronto to shew cause why their by-law, No. 292, should not be quashed on the grounds: 1st. That the by-law does not name a day, in the financial year in which the same was passed, when it is to take effect. 2nd. That the debt created by the said by-law is not made payable in twenty years at furthest from the day on which the by-law took effect. 3rd. That the debentures issued or to be issued under the by-law, are not made payable in twenty years at furthest from the day on which the by-law took effect. 4th. That the by-law is based on a petition of less than two-thirds in number and one-third in value of real property directly benefitted thereby of the owners of such real property. 5th. That instead of being a petition of two-thirds in number, and one-half in value of owners, it purports to be a petition of owners and occupiers, some of the latter not being owners, and many of the owners not being occupiers. 6th. That the by-law was passed without any previous notice having been, according to the by-law No. 292 of said corporation, left at the place of abode of the applicant, and other parties intended to be assessed for the contemplated improvements.

The by-law was produced, it was passed on the 8th of August, 1859, entitled “to provide for the construction of a stone side-walk on Yonge street, and to levy a rate to defray the costs thereof.” It recited a petition of certain persons and firms for the purpose, and that it had been ascertained as determined that the property comprised within certain fixed limits would be immediately benefitted

by the construction of the stone side-walk, and that the petitioners are two-thirds in number and one-half in value of the owners of real property to be directly benefitted, and that the value of the whole of the real property rateable under the by-law, is \$520,182 ; that the cost will be \$6925.50, and amount required to be raised annually by separate rates to pay debt and interest is \$761.80 $\frac{1}{2}$. It further recites the rate to be imposed per lineal foot frontage on the real property directly benefitted: and enacts—1. That the sidewalk be constructed. 2. Imposes the special rate. 3. Authorises raising the money by loan on debentures. 4. Directs that the debentures be made payable on the 1st of January, 1880, and the interest thereon half-yearly on the 1st of January and 1st of July. 5. Regulates the debentures as to place of payment, and directs expenditure of money raised, in constructing the sidewalk. 6. Has no bearing on the points raised. 7. Do. do. 8. That the by-law shall come into operation on the day it bears date.

Affidavits in support of the application were filed—1st. Of the relator, sworn 21 May, 1861, stating that to the best of his knowledge, recollection, and belief, no notice was left at his place of abode or elsewhere for him, of the assessment made or proposed to be made by the by-law, No. 292, or the amount thereof, or that such by-law would be passed: that he is one of the parties assessed under the by-law: that he was not aware of the by-law until some time after it was passed, and first became aware of the particulars of it, and of the proceedings on which it was based when called on to pay taxes for last year, (1860,) which was the first year in which an assessment was made under the by-law; and that this was, to the best of his recollection, in February last, 1861: that he consulted counsel, and was advised it was illegal, but as it was too late to move against it last Hilary Term; he was advised, in order to avoid a distress, to pay under protest, and to apply in the following term to quash the by-law: that he accordingly did pay under protest, and with the avowed intention of moving to quash the by-law.

Another affidavit of the relator stated, that the total number of assessed owners of real estate affected by the by-law

were, as he believes, as ascertained by the city clerk, twenty-three. That to the petition on which the by-law is passed there were subjoined the names of sixteen persons, setting them out. That out of the sixteen, eight persons were owners of real property affected. That the Bank of British North America, and the Bank of Montreal were also owners, but neither their corporate name nor seal were set and subscribed to the petition, but their respective cashiers or managers signed in their own names. That the other six persons did not own the real property they occupied, which was affected by the by-law.

Another affidavit shewed that by a by-law of the city, No. 12, passed on the 30th of May, 1859, it is provided that the clerk should cause a notice to be left at the place of abode of each of the parties to be assessed; that such assessment had been made, and the amount thereof, and that a by-law in accordance therewith would be passed by the council, unless appealed from as provided by act of parliament. That to the best of the deponent's recollection, no such notice was left at his residence or place of abode, or elsewhere, for him, though he was an occupant of property affected by the by-law, and was assessed thereunder. Copies of two by-laws were also put in, providing for the assessment of property benefited by local improvement, by which all petitions for such improvements when received by the council and referred to the city board of works are to be examined by the clerk of the council, who is to "examine and finally determine" whether such petitions are signed by two-thirds in number, and one-half in value of the owners of the real property to be directly benefitted thereby, and such petitions when found to comply with the provisions of the statute, (22 Vic., ch. 40, 1859,) he shall among other things endorse thereon his certificate of the correctness thereof, and of the value of the whole of the real property rateable under the by-law. The city engineer is to make a report, shewing what real property will be immediately benefitted by the proposed improvements, and the proportion determined by him, in which the assessment to defray the cost is to be made on the various portions of the real estate so

benefitted, and the clerk is to cause a notice to be left at the place of abode of each of the parties to be assessed for such improvement, that the assessment has been made, and the amount thereof, and that a by-law in accordance therewith will be passed by the council unless appealed from as provided by law.

Among the regulations of the City Board of Works is one that they will only recommend the construction of new works by special assessment, when the petitioners represent two thirds in number of the proprietors in fee, and one-half of the assessed value of the property.

By the clerk's certificate attached to the petition for this improvement, it is stated that the total number of persons assessed for property to be directly benefitted by this improvement was twenty-three; that sixteen names were signed to the petition; that the total value of the assessed property was \$520,182; that the amount represented by the signers of the petition was \$413,496, leaving unrepresented \$106,686. The petition began thus: "The petition of the undersigned being owners and occupants of property, &c." All these words were printed except "and occupants," which were interlined in writing.

In Trinity Term, *J. H. Cameron*, Q. C., shewed cause. He contended the relator could not go behind the petition and by-law; that the day of the passing of the by-law was a sufficient naming of a day for the by-law to take effect. He shewed by affidavits that the debentures were in fact made payable within 20 years, and gave up the fourth section of the by-law moved against which might be quashed, though the residue stood. He insisted that the relator was only an occupant, (a counterpart of the lease to him being by consent put in,) and that his lease only subjected him to pay rent and taxes in terms which do not apply to a special rate like this, and if so, as the relator shewed no other interest, he was not a person authorised to move against the by-law.

Harrison admitted that if the last objection was sustainable, the case was out of court.

Cameron filed affidavits. 1. From the Chamberlain of the city stating that all debentures issued by the city were drawn

up under his direction, and that all those issues under the by-law in question were made payable within twenty years from the date thereof, being dated on the 16th August, 1859, and made payable on the 1st July, 1879. 2. From the assistant clerk of the council, proving a copy produced of so much of the assessment roll of 1859 as refers to the stone sidewalk in question, as that roll was finally passed by the court of revision for the year; that the roll is the only means whereby the officers of the corporation can make the necessary computation as to the number of owners of real property to be benefitted by any improvement petitioned for and the value of such real property. That according to the roll, the petition in question was signed by more than two thirds in number and one-half in value of real property directly benefitted thereby, of the owners of such real property; that he made the calculation and believes the same to be correct, and made the necessary certificate, which was signed by the clerk of the council; that on the 2nd August, 1859, he filled up and addressed to each of the persons named in the seventh column of the assessment roll, under the head "owners and addresses" a notice of the application for the improvement and the intention to pass the necessary by-law for that purpose, (annexing a copy), and gave such notices to the messenger of the corporation to be forwarded to such parties.

In this roll the relator's name is entered in the first column as occupant, and in the seventh column, J. L. Robinson as owner, and the name of Mr. R. Gilmour, who made an affidavit in support of this application, appears in the first column. "Gilmour & Alfred Coulson," as occupants, and John Crawford in the 7th column, as owner. 3. Roddy, the messenger, made affidavit that all notices given to him by the assistant clerk to be forwarded, were either delivered by him to such persons personally, or left at their places of abode, or put in the post-office, and he believes the notices referred to in the foregoing affidavits of the assistant clerk, were placed in the post-office in Toronto, on the day they were delivered to him.

The lease put in was from James Lukin Robinson to Geo.

Michie and Thomas Kay, dated 24th April, 1857, made in pursuance of the act to facilitate the leasing of lands and tenements.

Habendum, for five years, with a covenant by the lessees among other things to pay rent "and to pay taxes."

DRAPER, C. J.—I am of opinion there is no weight in the objection as to the effect of the covenant to pay taxes. The statute in giving the enlarged sense of the limited expression extends it to all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary, or otherwise, charged or to be charged upon the demised premises, or upon the lessor on account thereof. We must therefore treat the relator as a person having an interest in the by-law.

As to the first objection, I have felt a good deal of doubt whether the legislature did not intend that in the body of every by-law shall be stated a day upon which it is to take effect. The date on which the by-law is passed does not necessarily form a part thereof, though it may be the practice for some officer of the corporation to mark the day of its passing thereupon. And I think the legislature meant that it should not be necessary to refer to any thing extrinsic to the by-law for the purpose of learning when it would or had come into operation. The purchaser of a debenture, for instance, would require to see that it and the by-law under which it was issued were legal, and might on that account require to see when the by-law took effect. The third objection is answered by the affidavits in reply, the debentures are made payable within twenty years from the day the by-law was passed, on which day it took effect.

I think the fourth objection that the petition on which the by-law is based, was not signed by three-fourths in number and one-half in value of the owners of the real property to be benefitted, cannot be entertained by us. The municipal institution act, section 300, expressly provides that the number of the owners and the value of the real property is to be ascertained and "finally determined" in the manner and by the means provided by by-law. There is a by-law for that purpose, under which the clerk of the city council has

acted. It is not objected that he acted corruptly and fraudulently, and though, as I gather from the unanswered statements in the relator's affidavits, the city clerk has fallen into error, an error easily accounted for, as his conclusions were drawn from the assessment roll only, yet I think we cannot on that account annul the whole proceeding.

The 191 section of the act plainly contemplates that this objection should be heard and disposed of by the counsel of the city before the by-law is passed.

I am not to be understood as determining that he should have confined his enquiry to the assessment roll, when he was required to ascertain and finally determine the matter of number and value, but I think that having acted as we must assume, *bona fide*, the legislature intended his determination to be final, as the foundation for the by-law authorising the improvement, and imposing the special rate. The fifth objection involves the same consideration.

The sixth objection is sustained in fact as I understand the statements. But the provision requiring notice of the intention to pass the by-law to be given or sent to parties affected by it, is not statutory, nor is the validity of the by-law made dependent on provisions contained only in by-laws. And although the relator states in his affidavit that he had no notice of the by-law "until some time after it was passed," and that he first became aware of the particulars of it, and of the proceedings on which it was based in February last, yet it is difficult to suppose that he was not aware long before that date, that the stone sidewalk was being laid down, or that the work was of that character which was usually paid for by special local rate. This was enough to put any one on enquiry. Then he seems from his own expression to have become aware of the by-law sometime before he became aware of its precise contents, but the knowledge of the first, was notice of the second, and he might then have learned everything necessary to support a much earlier application to quash the by-law.

There remains only the second objection, which is pointed at the fourth section of the by-law, and this section has been abandoned on the argument as illegal. To this extent

therefore the by-law must be quashed, and the question is whether the residue can be supported without it. I do not perceive that the statute makes it indispensable that the by-law should name the day on which either the debentures or the interest thereupon should become due and payable. The third section of the by-law distinctly authorises the raising the money by loan or debentures. It appears that the debentures themselves were issued in conformity to the statute, not in compliance with this illegal provision in the by-law. The other portions of the by-law are independent of the fourth section, and it would have been, as I think, a legal and effectual by-law if this fourth clause had not been introduced. We may, I think, lop off this rotten limb, and leave the tree to which it was attached in full vitality. It is unnecessary to its existence, and to its bearing the fruit it was intended to produce. To drop metaphor, it appears to me the defect is confined to the fourth section, and does not vitiate the rest; the fourth section must be quashed.

Upon the whole, though leaning in favour of the first objection which strikes at the whole by-law, yet when I consider the mischief or serious inconvenience which probably would result from quashing the by-law at this late period, I think we ought, as a matter of discretion, if we possess such a discretion, rather to discharge than to make absolute this rule. It is true a distinction has been well taken between objections intrinsic to the by-law, and such as appear on the face of it, as to the duty of the court on applications to quash; and this objection is not extrinsic, but the Consol. Stat. U. C., ch. 2, sec. 18, subs. 2, enables us to treat the word *may* "as permissive," not mandatory, and the 195 section of the municipal institution act says, the court *may* quash a by-law in whole or in part for illegality. Treating the expression as conferring an authority, with a discretion to abstain from its exercise, I think this a fitting occasion to exercise that discretion.

I think, therefore, the rule should be made absolute to quash the fourth section of the by-law, and should be discharged as to the residue, without costs on either side.

Per cur.—Rule discharged.

SMITH V. MODELAND.

Tenant—Landlord—Possession—Title.

A tenant let into possession by a party claiming rent cannot afterwards dispute the title of the party letting him into possession; nor if let into possession by a third party, and having acknowledged the title of, and agreed to pay rent to, the plaintiff, can he afterwards compel him to prove his title.

APPEAL from the county court of the united counties of York and Peel.

Declaration for use and occupation.

Pleas.—Never indebted and payment. Joinder.

The case was tried on the 20th of March, 1861, when the following evidence was taken:—

John Leys, (for the plaintiff.)—I know both the plaintiff and defendant; the defendant resides in Goderich. Premises, one hundred acres leased to defendant; there were eighty acres cleared; in April, 1860, I went to the farm; before that time the defendant came in to rent the farm; the plaintiff was the owner then; the defendant wished to have the first offer of the place; I was authorised to rent it; I made arrangement in April, 1860; the defendant was to keep it until the 1st of October, 1860, and to pay fifty-pounds rent; the defendant was to get his mother as security for the rent; he has not paid any rent.

Cross-examined.—I was acting for Mr. Smith; I was authorised to let it for the season; the defendant was in possession, and had been for some time; Isaac Modeland was landlord, and defendant lessee of the same land; I was acting for the plaintiff, and not directly for Mr. Gunn; the defendant did not want the premises for a year; I found the defendant in possession when I went to the premises; the premises are now rented for seventy-five pounds per annum.

McMichael, for defendant, objected, that there was no proof of legal title, and the defendant being in possession, they cannot claim rent, as against defendant, without showing title, leave being reserved to enter nonsuit.

Verdict for plaintiff, damages fifty pounds.

A rule having been issued for a nonsuit, it was made

absolute after argument, from which judgment this appeal was made on the ground that the evidence shewed clearly that the defendant acknowledged the title of the plaintiff, and that the verdict should therefore have been sustained.

J. H. Cameron, Q. C., for plaintiff, cited *Cornish v. Searell*, 8 B. & C. 471; *Hall v. Butler*, 10 A. & E. 204.

McMichael, contra, cited *Gregory v. Doidge*, 3 Bing. 474; *Claridge v. Mackenzie*, 4 M. & G. 143.

DRAPER, C. J.—I have looked at all the cases cited by Mr. *McMichael* on the argument, and at those apparently relied upon in the court below.

I take the rule to be well established, that when a tenant is let into possession by the party claiming rent as landlord, the tenant is not permitted to dispute the title of him from whom he obtained possession. On the other hand, if being already in possession a third party claims to be entitled, and the tenant agrees to pay, and, according to some authorities, actually pays rent to such third party, the tenant may nevertheless dispute his title, and shew that his claim to the premises was unfounded.

But this decision goes the length of determining that a tenant, by simply shewing that he entered under another party who then claimed the title, can not only deny the right of the plaintiff, to whom he promised to pay rent, and prove title in another, but can compel the plaintiff to prove his title to the premises. I do not think any authority warrants this, and at the trial it was not pretended that the evidence shewed title in any one except the plaintiff.

The appeal must therefore be allowed, and the rule for granting a nonsuit be discharged.

RICHARDS, J.—I think the defendant did not go far enough; agreeing to pay rent was sufficient to make a *prima facie* case against him, and though not estopped from shewing that the plaintiff was not entitled to receive the rent, he offered no evidence to that effect, and the finding of the jury was warranted by the evidence. The learned judge of

the county court probably overlooked the distinction between permitting the defendant to shew that the plaintiff was not entitled to the rent, and requiring the plaintiff to give further evidence that he was so entitled beyond the defendant's promise to pay.

I think the appeal must be allowed, and the rule in the court below on which the nonsuit was granted should be discharged.

Per cur.—Rule discharged.

PROUDFOOT V. HARLEY.

Interpleader—Verdict on default—Motion to set aside—Affidavit of merits.

A verdict having been taken in an interpleader suit in the absence of the defendant upon a clear *prima facie* case, the defendant, upon a motion for a new trial, swore that he had not information of the trial coming on in time to be at the assizes, and his attorney swore that from information obtained from the plaintiff's brother, he verily believed the defendant had a good defence on the merits.

Held, not to be sufficient without shewing facts upon which his belief is founded, and sufficient cause for his absence from the trial not being shewn, a new trial was refused.

INTERPLEADER to try whether certain goods, taken in execution by the sheriff of Halton, under a *fi. fa.* delivered to the sheriff on the 24th of August, 1860, for having execution of a judgment recovered by the defendant against John Proudfoot, were at the time of the delivery of the writ to the sheriff, the property of plaintiff as against defendant.

The trial took place in March last, at Milton, before Richards, J. It appeared that the property in question was fifteen tons of hay, thirty bushels of peas, twenty bushels of barley, and about five acres of fall wheat in the ground. The hay and wheat were seized on part of lot No. 22, north of Dundas street, the rest was on the front of that lot, in a hollow. Certain documents were put in to shew the plaintiff's title to the land, and that John Proudfoot resided thereon as agent for plaintiff, who supported him, and had furnished him with funds to buy seed wheat, and to stock the farm, and to carry it on; and that John Proudfoot was wholly dependent on the plaintiff for support. No

one appeared for the defence, and the jury found for the plaintiff.

In Easter Term, *J. V. Spohn* obtained a rule *nisi* for a new trial, on the ground that the verdict was taken in the absence of counsel for the defendant, and upon merits and upon grounds disclosed in affidavits and papers filed.

The defendant's attorney made two affidavits, one shewing that about the 8th of July, 1858, the defendant Harley recovered a judgment against John Proudfoot, brother of plaintiff, for £117 and costs, on four promissory notes, made by John Proudfoot, in 1853, 1854, 1856, and 1857, given to plaintiff for his wages. The other stating that notice of trial was given on or about the 22nd of February last, that on the 2nd of March he wrote to inform defendant the cause would be tried on the 13th of March, and directing defendant to come at once to see him to make the necessary preparations for trial. That defendant never came. That he believes defendant has merits.

The defendant made affidavit, that late in the evening of the 12th of March last, he received two letters from his attorney, dated about the 2nd of March, informing him this cause was to be tried on the 13th of March. That he set off for Milton expecting to find his attorney there. That the verdict was taken on the 1st day of the assizes. That he attributes the not getting the letters to some delay or mistake in the post-office at Palermo, where he is satisfied they were, and where he had frequently sent to enquire for them. That he is satisfied that if a new trial is granted he will be able to shew that the goods in question, or the greater portion of them, belong to John Proudfoot, and that plaintiff only claims them to defeat creditors of John Proudfoot. That though John Proudfoot professes to be worth nothing, he uses, occupies, and enjoys a very large amount of real and personal property as of his own right.

In Trinity Term, *Stanton* shewed cause.—He objected to the jurat to the defendant's affidavit, which was in the form following:—Sworn before me, at—, on—, “and I certify that it was first read over and explained to him, and he seemed perfectly to understand the same.” Defendant put

his mark to the affidavit. That by the jurat of one of the affidavits made by defendant's attorney, it appeared to have been sworn at the city of Hamilton, in the county of Wentworth, before Charles J. Carroll, who is not a commissioner for taking affidavits in the county of Wentworth. The plaintiff's attorney makes affidavit that the cause was taken in its proper order, the defendant being present, on the first day of the assizes, and the plaintiff made an affidavit that he has been for four years, and is absolute owner of the northerly half of Nos. 22 and 23, 1st concession north of Dundas street, Trafalgar. That his brother John resides on the land, acting as plaintiff's agent, farming the land for plaintiff's profit, and being a very old man and indigent, has been for many years wholly supported by plaintiff; that in consequence of the produce of the farm being insufficient to support John Proudfoot and his family, plaintiff has had to make up the deficiency, and pays about \$50 per annum for flour furnished to him, (John.) The affidavit states other large advances to John Proudfoot. That the things seized by the sheriff and now in question, were the produce and increase or return of the land above mentioned, and were his (plaintiff's) property. That it is utterly untrue that plaintiff claims these goods to prevent John Proudfoot's creditors obtaining what they are justly entitled to, as plaintiff holds nothing which belongs to John. That he has advertised the land for sale or to let, and has been unable to find a tenant or purchaser.

Stanton cited *Shaw v. Perkin*, 1 Dowl. N. S. 306; *Sharpe v. Johnson*, 4 Dowl. 324; *Cooper v. Archer*, 12 Price, 149; *Blackwell v. Allen*, 7 M. & W. 146.

Harrison, R. A., in reply, cited, 1 D. & L. 698; *Ex parte Smith*, 2 Dowl. 607; *Wilson v. Blakey*, 9 Dowl. 352. He urged that the defects in the affidavits in matters of form might be amended.

DRAPER, C. J.—It will be unnecessary to consider whether we should grant time to supply formal defects in the affidavits put in for defendant, unless the matters of substance contained in them are sufficient to sustain the defendant's

application. The plaintiff seems to have established his right by sufficient evidence. The defendant has to shew first, that he has reasonable grounds on which to impeach the verdict, and second, a sufficient excuse for not being ready and present at the trial.

The only affidavits on the defendant's side are made by himself and his attorney, and the only statements which the attorney makes are, that he is instructed that the defendant will be able to shew that a large portion of the grain taken in execution was grain that was [some word omitted] by one of the tenants of the said John Proudfoot, and given by the said tenant as rent, and that he has taken considerable trouble to ascertain the particulars connected with the defendant's case both by information and by an examination of John Proudfoot, who was in possession of the goods and chattels seized, and that the defendant has a good defence to this action on the merits as he (the attorney) is informed and verily believes. If he had taken the additional trouble to lay before the court the more important particulars he ascertained especially those elicited by the examination of John Proudfoot, we could have formed some opinion on the merits, as it is, we are left to the belief of the attorney that according to the information he has received there is "a good defence to this action" on the merits, a form of expression not altogether accurate in an interpleader issue. The defendant swears he is satisfied, that if a new trial is granted he will be able to shew that the goods and chattels in question belong to John Proudfoot and not to the plaintiff, who only claims them to prevent John Proudfoot's creditors from obtaining what they are justly entitled to; and that although John Proudfoot professes to be worth nothing, he uses, occupies and enjoys a very large amount of real and personal property as of his own right. In connection with this we must read the plaintiff's affidavits, swearing unequivocally to his right to the land occupied by or under the control of John Proudfoot, and that the goods seized were the produce and increase or return of the land owned by plaintiff, and were plaintiff's property, and explaining fully under what circumstances John Proudfoot, the plaintiff's brother, "a very old man and in indigent

circumstances," was there in possession. So far as any facts are disclosed the merits appear to me to be with the plaintiff. The defendant, as is sworn by the plaintiff's attorney, was at the trial, and had therefore an opportunity of knowing what the plaintiff's case was; the trial took place on the 13th of March, the rule here was applied for on the 22nd of May, so there was ample time for the defendant to have procured affidavits from parties who gave the information on which the belief of the defendant's attorney is founded. This, however, has not been done, and not an affidavit is sworn until the 13th of May, when the defendant makes his, while the attorney's affidavits are postponed until the day on which this motion is made.

Then as to the excuse for not being ready at the assizes. The attorney writes to his client on the 2nd of March, and though he gets no answer, takes no more trouble but waits, and the defendant swears he only got the letters late in the evening of the 12th March, "in consequence of some delay or mistake connected with the post-office, as I had expected the letters for some time and had frequently sent to the post-office at Palermo for letters," and that he is satisfied the letters were at the post-office at Palermo at the times when he was informed there were no letters for him, and under these circumstances he does nothing until the assize day. The delay as to the delivery of the letters, and the enquiries for them and the answers given at the post-office, are no further explained.

Under these circumstances I think the rule should be discharged. I think it was incumbent on the defendant to have given a more full and satisfactory explanation of the facts on which he relies to rebut the apparently clear case for the plaintiff, and should not have confined himself to a statement of opinions and belief, founded, as to the attorney, upon information of which neither the nature nor sources are stated. The statement of merits could scarce have been more general and indefinite if the defendant were asking to set aside an interlocutory judgment and to be let in to plead, where the plaintiff had not lost a trial.

Per cur.—Rule discharged.

HERVEY ET AL., ASSIGNEES OF ALFRED HOOKER, V. THE
MUTUAL FIRE INSURANCE COMPANY OF PRESCOTT.

Insurance policy—Change of risk without notice—Policy vitiated thereby—Conditions.

The premises covered by a policy of insurance were, when insured, used as a store, and were after insurance used as a printing office, without notice to the company or the settlement and payment of any additional premium for the increased risk, contrary to a condition endorsed thereon.

Held, that the policy was vitiated.

DECLARATION on a policy of insurance made by defendants to plaintiffs to insure on a dwelling house of plaintiffs such loss as they might sustain by fire in respect of the said dwelling house not over \$600, provided that sum should not exceed two-thirds of the value thereof. Averment of the destruction of the house by fire, that the actual cash value thereof at the time was \$832, and that although plaintiffs have fulfilled the conditions of the policy, by them to be observed, yet defendants refuse to pay.

Pleas.—1. Setting out condition No. 1 of the policy, that at the time of assuring the building it was occupied as a store, but afterwards, and at the time of the fire, was occupied as a printer's shop, whereby the risk was rendered more hazardous, and plaintiffs did not settle an additional premium and pay the same in accordance with the condition. 2. Setting out condition No. 7, that plaintiffs did not, within the time specified, produce or deliver to defendants the oath or affirmation of the plaintiffs in accordance with the condition. 3. That the building was not of the cash value of \$832. 4. That the plaintiffs were not, at the time the assurance was effected, the owners of the building. Replication to first plea, that by reason of the occupation of the building as a printer's shop the risk was not rendered more hazardous. Issue joined on the other pleas.

The case was tried at Brockville, in October, 1860, before Sir J. B. Robinson, C. J. It appeared that the land on which the insured building stood did not belong either to the plaintiffs or to Alfred Hooker, whose assignees they were, the building alone was theirs. Alfred Hooker, as agent for the plaintiffs, made the application to insure for three years

from the 23rd of December, 1858. He described the building as a wood rough-cast building, used as a store when occupied, and the description in the policy, which was dated the 23rd of December, 1858, corresponded. This building was destroyed by fire on the 18th or 19th of January, 1860. The fire originated in a neighboring building. At the time of the fire the plaintiff's premises were occupied as a printing establishment or store, a newspaper being printed there. On the 20th of February, 1860, Alfred Hooker, as agent for plaintiffs, gave notice to defendants of the fire. On the 6th of March following, he forwarded to defendants the requisite certificate from a justice of the peace, and an affidavit of one Dowsley as to the value of the building, and in the letter enclosing these papers, requested to be informed if anything more was required. No immediate reply was given by defendants. On the 16th of April, Alfred Hooker sent in his own affidavit respecting the fire, stating to the best of his knowledge the origin of the fire, and that the building in question at the time of the loss was occupied as a printing office. On the 24th of April the defendants' secretary acknowledged the receipt of this affidavit, and called Mr. A. Hooker's attention to the fourth article of the conditions endorsed on the policy, which require that the affidavit shall be made by the member suffering loss. On the 12th May, the plaintiffs joined in an affidavit verifying the destruction by fire of the building in question occupied as a printing office, stating its value. This affidavit was delivered to the defendants on the 14th of May. On the first of June, 1860, the defendants' secretary sent to Mr. A. Hooker a resolution of the board of directors that the claim of plaintiffs should not be paid. On the 10th of July, 1860, the defendants' secretary addressed a circular to Mr. Alfred Hooker, demanding his "proportion of the losses accruing to this company during the continuance of your policies Nos: 222, 223, and 1348," which last is the number of the policy in question in this cause, and on the 20th August, 1860, the amount so demanded was paid. It appeared clearly that the building was occupied prior to the insurance as a book store, that it was vacant when the insurance was effected, was afterwards occupied as a milliner's and at the time

of the fire as a printer's shop. It also appears that a printing office is, by the rules of the defendants, an extra risk. The premium note given in this case was signed by the plaintiffs alone, though they did not own the land on which the building stood. Several witnesses called by plaintiffs stated, that they did not think the risk was in fact increased by a printing office being kept in the building. On the defence it was proved that the defendants, and other insurance companies, treated a printing office as a more hazardous risk than an ordinary store, and charged a higher rate of premium.

The learned Chief Justice left to the Jury to find to value of the building at the time of the fire, and by consent directed a verdict for the plaintiffs for that sum, reserving leave to defendants to move to enter a verdict for them on all or any of the issues, if, in the opinion of the court, the defendants on the evidence were entitled to a verdict, the court being at liberty to draw such inferences from the evidence as a jury might do. It was also agreed that the court might allow any amendments to be made in the pleadings on either sides, which they should think the judge at the trial ought to have made on application.

In Michaelmas term, *A. Richards* obtained a rule *nisi* to add pleas, 1st, that the building was upon land not owned by the plaintiffs, and therefore there should have been another signer to the premium note; 2nd. that the true title of the plaintiffs was not set out in the application or in the policy, and also to enter a verdict for the defendants on the leave reserved, and to enter a verdict for the defendant if the court, who, as regards the facts, are to fulfill the powers of a jury, think that on the evidence and the amended pleas the defendants should have a verdict.

M. C. Cameron shewed cause in the following Trinity Term. He contended that the evidence did not shew that the risk was increased. That the letter of the secretary of the company amounted to a waiver of a more particular performance of the seventh condition. He referred to *Mann v. Western Assurance Co.* 17 U. C. Q. B. 190; *Platt v. Gore*

District Mutual Assurance Co., 9 C. P. U. C. 405; Cameron v. The Monarch Assurance Co., 7 C. P. U. C. 212; Cairncross v. Lorimer, 3 L. T. N. S. 130.

Richards, contra, referred to Consol. Stat. U. C., ch. 52, sec. 34; *Mason v. Harvey*, 8 Exch. 819; *Worsley v. Wood*, 6 T. R. 710; *Cinq Mars v. Equitable Insurance Co.*, 15 Q. B. U. C. 246; *Roper v. London*, 5 Jur. N. S. 491; *Lampkin v. Western Assurance Co.*, 13 Q. B. U. C. 237; *Jacobs v. The Equitable Fire Assurance Co.* 17 Q. B. U. C. 35; *Langel v. Mutual Insurance Co. of Prescott*, 17 Q. B. U. C. 524; *Merritt v. Niagara District Mutual Fire Insurance Co.*, 18 Q. B. U. C. 529; *Sillem v. Thornton*, 3 E. & B. 868.

DRAPER, C. J.—The 34th section of ch. 52; Consol. Stats. U. C., enacts, that if any alteration in any house or building be made by the proprietor thereof, after an insurance has been made thereon with the company, whereby it is exposed to greater risk and hazard from fire than it was when insurance was effected, the insurance thereon shall be void unless an additional premium or deposit after such alteration be settled with and paid to the directors. This statutory condition affects all our mutual insurance companies, and of course applies to the plaintiffs. Upon the evidence given, we think the proper conclusion of fact is, that the risk was increased by the occupation of the premises as a printing office, and consequently, as no additional premium or deposit was settled and paid, the policy was avoided. We are further of opinion that the defendants are entitled to succeed on the issue on the second plea. And if the pleas were added, which we see no ground for refusing, the evidence would sustain them also.

Under these circumstances we think we should make the rule absolute. It is unnecessary to discuss the various cases cited, which have been before us on other occasions. With regard however to the last case cited, I must refer to the judgment of *Willes, J.*, in *Thompson v. Hopper*, in the Exchequer Chamber, E. B. & E. 1049. He states the law thus:—"In effect there being no violation of the law and no fraud in the assured, an increase of risk to the subject mat-

ter of insurance, its identity remaining, though such increase of risk be caused by the assured, if it be not prohibited by the policy, does not avoid the insurance." In our case the statute just referred to contains the prohibition, conditional it is true, but a prohibition unless the condition be fulfilled. The learned judge proceeds, "I may add there is a case of *Sillem v. Thornton*, which turned mainly upon a question of identity of the subject matter intended to be insured at the time of the insurance, and may be sustained on that ground notwithstanding our present decision. That part of the judgment in that case which discusses the above point was not called for by the facts, and if it was intended to negative the proposition just stated, we ought to overrule it."

Per cur.—Rule absolute.

MCMMASTER V. THE CORPORATION OF NEWMARKET.

By-Law—Quashing of—Corporation—Ordinary expenditure of—Power to dispose of funds.

On motion to quash by-laws 68 and 69, passed by the corporation of the village of Newmarket, on the 5th of August, 1861. The first after reciting that it is necessary that the corporation should purchase a site for a town hall, enacts that they purchase a certain parcel for the sum of \$250. Secondly, that the Reeve shall issue his draft for the said sum, payable the 1st of November, 1861. The second, (No. 69,) after reciting that the inhabitants of the village are desirous of erecting a town hall, and that there will be a large surplus in the hands of the corporation after paying for the site, and paying the ordinary expenses of the village for the year, enacts that \$750 be appropriated for the erection, and that the Reeve should issue his drafts, payable the 1st of November, 1861.

At the time of passing these by-laws there had been no by-law passed to provide for the ordinary expenditure of the year.

On motion to quash, *Held*, that the corporation has no power, without the consent of the electors, to authorise the expenditure of money for purposes not falling under the head of ordinary expenditure, without having the money in hand to meet the demand, and without making provision by rate or otherwise to raise the required amount to meet the demands when they become due.

S. M. Jarvis obtained a rule *nisi* to quash by-laws Nos. 68 and 69, of the corporation of Newmarket, on the following grounds: 1st. That they are by-laws for raising money upon the credit of the municipality, and for contracting debts not payable within the present municipal year not required for its ordinary expenditure, and have not received

the assent of the electors of the municipality. 2nd. They do not name a day in the financial year when the same shall take effect. 3rd. They do not name a day when the debts thereby created shall become payable. 4th. No special rate is settled, to be levied for paying the debts to be created, nor the amount to be levied annually. 5th. The amount of the rateable property in the corporation for the year 1861 is not ascertained. 6. The by-laws do not shew the amount of the rate in the dollar to be levied by the corporation for the year 1861, nor that such rate will not exceed the rate of $\frac{1}{100}$ in the dollar. 7th. They do not contain the recitals required by the municipal corporations act, Con. Stat. U. C. ch. 54, sec. 222. 8th. A by-law for a similar purpose was rejected by the rate-payers of the village.

By-law No. 68 was passed on the 5th of August, 1861, and is entitled a by-law for purchasing a site for a town hall. It recites that it is necessary the corporation should purchase a piece of land whereon to erect a town hall, and that a certain piece can be bought from Moses W. Bogart for \$250; and enacts that the corporation do purchase the said parcel of land for \$250, to be used as a site for a town hall. 2nd. That the Reeve shall issue his draft to the said Moses W. Bogart for \$250, so soon as he shall have properly conveyed and assured the said parcel of land to the corporation, payable the 1st day of November, 1861.

By-law No. 69 was passed on the same day, and is entitled a by-law for erecting a town hall. It recites that the inhabitants of Newmarket are desirous of erecting a town hall, that the corporation are about purchasing a site for such hall, and that it appears there will be a large surplus in the hands of the corporation after paying for the site and paying the ordinary expenses of the village for the year; and enacts—1. That the committee appointed to obtain a site for a town hall, and to make the necessary arrangements for the building of the same, do at once proceed to erect a hall on the land to be purchased as a site therefor. 2nd. That the sum of \$750 be appropriated, to be expended by the committee on the erection of the hall. 3rd. That the reeve do issue his draft for such sums as may be re-

quired by the committee as the work on the hall progresses, so that the amount for which said drafts are issued shall not in the aggregate exceed \$750, not payable before the 1st of November, 1861. 4th. This by-law not to take effect unless the by-law for the purchase of a site passes.

An affidavit of a resident and rate-payer of the village of Newmarket was filed, stating that a by-law was prepared by the council of the corporation of that village in June, 1861, for raising by loan \$4,600 upon interest, payable within 14 years, to be applied in the purchase of a site and the erection of a town hall and market, in the said village, a copy of which is annexed to the affidavit, which by-law, on the 9th of June, 1861, was put to the vote of the electors, and was rejected by a majority of 85 out of 109 voters, only 12 voting for it. That three of the council, being a majority, passed by-laws Nos. 68 and 69, the other members opposing them. That neither of these by-laws were submitted to the electors, and they were passed in defiance of a petition signed by a very large majority of the electors. That at the time the affidavit was sworn, the 29th of August, 1861, the assessment roll had never finally been revised, nor had any estimates of the ordinary expenditure of the corporation for the current year been prepared or submitted to the council, and no rate had been settled for the payment of the ordinary expenditure, nor had any special or other rate been imposed for discharging the debts to be created by the purchase of the site and the erection of the town hall. That for 1860, the whole rateable property of the village was \$14,800 or thereabouts, and the rate levied for that year was $\frac{1}{10}$ in the dollar, leaving a surplus of about \$19. That the rateable property of the present year as appears by the assessment roll, as it then stood, was \$17,017 27c. A rate of $\frac{1}{10}$ in the dollar would produce the sum of \$850 or thereabouts, and the income of the said corporation from all other sources will not exceed \$700 or thereabouts, and the ordinary expenditure will amount to about \$1,000 as the deponent believes; that the architect had shewn him the plans and specifications for the town hall, and had told him (deponent) that the building could not be completed for less

than \$1,400, and that was only intended to complete the external portion of the work this year.

Harrison, R. A., shewed cause.—He filed an affidavit of one of the municipal council, attacking the motives of the person whose affidavit is above set forth, and stating that the place selected by by-law No. 68, is approved by a majority of the ratepayers, who have signed a certificate to that effect. That neither of the by-laws Nos. 68 and 69 were submitted to the ratepayers, because it was neither necessary nor proper, as the money to be expended was intended to be raised and expended within the present year, and the members of the council who passed the by-laws were aware that a large majority of the ratepayers were in favour of the proceedings of the council as regarded those by-laws. That the revenues of the year will be sufficient for this purpose, after providing for all other expenditures made or contemplated. That the rate usually levied is $\frac{1}{16}$ in the dollar, which the deponent believed had been levied every year since the village has been incorporated. That the other sources of revenue will produce \$1250 and upwards. That estimates of revenue and expenditure for the current year have been repeatedly made by committees, (not shewn what they are.) That the site of the hall cost \$250, and has been conveyed to the corporation. That the estimate of the architect for the hall was \$750 to \$800. That this expenditure will complete the hall, so that the same will answer all the purposes of a town hall. That certain additions will probably be made at a future day, such as a gallery and partitioning off two ante-rooms, but they are not included in the work the council contemplates doing, though if added the architect estimates the whole expense at \$1400. That the council has contracted for the lumber and timber and accepted tenders for the erection. That there will be a pecuniary advantage (explained how) result to the corporation if the hall is up and enclosed this autumn. That the drafts are not made payable until the 1st of December, and that the rates are not usually collected until October and November. That the principal part of the lumber and timber has been delivered, and the carpenters' work is in a for-

ward state. Attacks the petition stated in the other affidavit to have been signed by a majority, because signatures, as the deponent believes, were obtained by misrepresentation and fraud, and many of the signers have since signed a certificate approving what the council have done.

DRAPER, C. J.—It would be better if the affidavits were confined to the statement of such matters of fact as have a bearing upon the questions which the court are called upon to decide. A good deal of what is above stated, and much more, which is not stated, might have been omitted without injury to the real merits, viewing the nature of the application, and the duty of the court in respect to it.

We are of opinion that the rule must be made absolute to quash both by-laws. Each of them authorises the expenditure of a considerable sum, for a purpose clearly not falling under the head of ordinary expenditure, without having money in hand to meet the demand, and without making any provision by rate or otherwise to raise the necessary amount to meet the demand, when, according to the by-laws, it will be due and ought to be paid.

It appears that the subject matter of each of these by-laws had been already discussed, and to effect the desired object it had been thought advisable to authorise the creation of a debt not to fall due within the financial year. This rendered an appeal to the electors necessary, and they decided by a large majority against the proposal. The present by-laws are intended to attain the same object by a different mode, and to avoid the necessity of a reference to the electors by making the debt payable within the financial year. It is urged on behalf of the municipality that they have hitherto been in the habit of imposing a rate of $1\frac{1}{100}$ in the dollar (the highest rate they have power to impose) for their ordinary expenditure, and that the produce of that rate if again imposed for 1861, added to some other revenues, will leave a sufficient surplus to meet these new debts when they become payable.

This, however, seems open to very serious objection. There is no existing surplus shewn. If there were, and

this expenditure was directed by these by-laws to be made out of it, there would be no difficulty, for the objects are within the authority of the corporation. But for all we see, there has been no by-law passed for the ordinary expenditure, and I do not see what right the corporation have to create a surplus to be at their disposal, by raising, under the declared purpose of providing for ordinary expenditure, more than is obviously or probably necessary for it. It is true that the corporation might even yet pass a by-law authorising a special rate to supply funds for the purposes of these two by-laws. But in the meantime the whole debt may be incurred, for the operation of these by-laws is not made contingent on the imposing a sufficient rate to raise the money, or upon the money being raised by other means. Money or no money, the expenditure is directed, and thus, unless a rate be specially imposed, or under the name of ordinary expenditure a much larger sum than is necessary is raised, (if that can legally be done,) when the 1st of November arrives there will be no funds to meet the reeve's drafts for \$1000, and a debt will exist which must be paid by funds to be raised during the ensuing year, though in terms made payable in the present year.

Considering the whole scope and apparent intention of the statute with regard to the incurring debts by municipalities, we think that no expenditure for extraordinary purposes shall be authorised by by-law unless it be out of unappropriated money in hand, or unless the by-law provides expressly for raising the necessary money, or is not to come into effect and be acted upon until some other by-law is passed, making the necessary provision.

We think, therefore, this rule should be made absolute with costs.

Per cur.—Rule absolute.

JAMES DUNNE V. MILES O'REILLY.

*Attorney and artied clerk—Agreement for partnership during articles—
Stat. 22 Geo. II., ch. 46—Action not maintainable on.*

An attorney entered into an agreement with an artied clerk to take him into partnership at the expiration of his articles, and that his share in the profits should commence from the date of his articles; the evidence did not shew that the clerk had been admitted. A mutual separation took place upon a disagreement, and an action was brought for compensation for services.

Upon a verdict for plaintiff under the learned judge's charge.

Held, that the case came within the provision of 22 Geo. II., ch. 46, which is in force in this province although repealed in England, and that the action was not maintainable.

Common counts.

Pleas.—1. Never indebted. 2. Payment. 3. Set off.

At the trial, at the Hamilton assizes, in March, 1861, it appeared that the plaintiff having been a member of the bar in the mother country, was admitted as a barrister in Upper Canada. The plaintiff was artied to the defendant as an attorney, and, as was admitted at the trial, upon an understanding that he was to become a partner with the defendant after being sworn in as an attorney, and was to receive one fourth of the profits of all business taken in the office from the time he became the defendant's clerk; his articles of clerkship expired about the 17th of March, and he left the defendant's office, but with the defendant's consent, in consequence of disagreement between the parties, about the end of June or beginning of July following.

Evidence was given to show what the defendant's business was worth, and evidence to shew that the plaintiff was not very well skilled in common law practice; it did not appear when the plaintiff was admitted as an attorney. It was objected, that notwithstanding this agreement, the plaintiff had no right to any remuneration during the time that he was a clerk under articles.

The learned judge held that if the agreement was as stated, the plaintiff would have a right to recover something according to the value of his services.

The defendant then opened evidence as to his set-off, upon which the learned judge referred the taking the accounts to an arbitrator, and left it to the jury to say what amount of

compensation the plaintiff was entitled to according to the arrangement, upon which they were of opinion the plaintiff was employed by the defendant. The first entry in the defendant's books, made by the plaintiff, was dated the 28th of October, 1858, and the last the 27th of May, 1859.

The jury found for the plaintiff—damages £200, the question of set-off being referred to an arbitrator.

In Easter Term, *Eccles*, Q. C., obtained a rule nisi for a new trial for misdirection. 1. In holding that the plaintiff was entitled to recover for his services under a *quantum meruit*, for the agreement was that the plaintiff should become a partner, and he had voluntarily abandoned it, and therefore could not recover any thing under it. 2. In ruling that the plaintiff was entitled to recover for services during the time he was an articulated clerk to the defendant.

M. C. Cameron showed cause, citing *Keys v. Harwood*, 2 C. B. 905; *Emmens v. Elderton*, 18 Jur. 21.

Harrison on the same side, referred to *Phillips v. Jones*, 1 A. & E. 333; *Bryant v. Flight*, 5 M. & W. 114.

Eccles, Q. C., said the cases cited did not apply, as they were cases of wrongful dismissal; that the evidence shewed the arrangement was put an end to by mutual consent. The contract was that on a given event he should be admitted as a partner, and should have a fixed proportion of the profits of the business. He never became a partner, and agreed with the defendant to put an end to the arrangement, consequently he has no right to recover. He cited *Whyatt v. Marsh*, 4 U. C. Q. B. 485; *Parnell v. Martin*, 5 C. P. U. C. 473; *Taylor v. Brewer*, 1 M. & S. 290.

DRAPER, C. J.—The understanding between the plaintiff and the defendant as admitted on both sides at the trial, and which formed the basis of the plaintiff's demand, was this, as I gather from the evidence, that the defendant being a practicing attorney, took the plaintiff as an articulated clerk, and it was agreed that as soon as the plaintiff had completed his services, and had been admitted to practice as an attorney, he should be taken into partnership with the defendant,

and should receive one fourth of the profits of the defendant's business, to be computed from the commencement of the plaintiff's services under the articles to the defendant. But two or three months after the expiration of the service, the parties having disagreed parted by mutual consent. The articles expired in the vacation; the plaintiff and the defendant finally separated some weeks after the first day of the following term, but it did not appear whether the plaintiff was at that time or since, admitted to practice as an attorney.

So far as is shewn, all parties seem to have overlooked the stat. 22 Geo. II., ch. 46, which together with enactments respecting exactions of the occupiers of locks and weirs upon the Thames, for regulating the assize of bread, for preventing the distempers spreading among horned cattle, makes regulations in respect to attorneys and solicitors. This act, though repealed in England by 6 and 7 Vic., ch. 73, continues in force in this province. In the case of *Tench v. Roberts*, Mad. & Gel. or 6 Mad. 145 N., it seems to have been considered that an attorney who forms a partnership with an unqualified person, came within the act, and also that an unqualified person assisting in the business and sharing the profits was to be considered as a partner, as the necessary result was to enable him to practice as an attorney for his own profit.

In re Jackson v. Wood, 1 B. & C. 270, is also a very strong case to shew how the court of Queen's Bench view such a proceeding. I may also refer to *ex parte Whatton*, 5 B. & A. 824; *In re Clark*, 3 D. & R. 260; *In re Isaacson* 8 Moore 214, 322; *In re Garbutt*, 2 Bing. 74; *Sterry v. Clifton*, 9 C. B. 110.

The case of *Williams v. Jones*, 5 B. & C. 108, is, I apprehend, in principal fatal to the plaintiff's claim for services while such an agreement existed, at least during such time as elapsed before he was admitted as an attorney. *Scott v. Miller*, 5 Jur. N. S. 858, shews the law is the same under the 6 & 7 Vic., though the facts did not sustain a charge of violating its provisions.

This objection to the plaintiff's recovery was not taken at

the trial, or on the argument. Whether advisedly foregone or no, the court can neither overlook it or permit an arrangement so plainly contrary to the policy of the statute regulating attorneys to be treated as binding, or as capable of furnishing a substratum for an implied promise to pay for services actually rendered in part performance of it. Whether any thing that took place after the plaintiff was admitted an attorney can uphold a claim against the defendant, we are not called upon to enquire.

The rule must be made absolute with costs.

Per cur.—Rule absolute.

HOLDEN AND ADAMSON V. EDWARD LANGLEY.

Interpleader issue—*Con. Stat. U. C., ch. 30, sec. 8.*

In an interpleader issue, under ch. 30, sec. 8, *Consol. Stat. U. C.*, to try title of claimants of goods as against the execution creditor, *Held*, that the form of the issue assumes the right of the execution creditor to seize the goods of the execution debtor, by virtue of a judgment recovered against the debtor, and consequently the execution creditor is not bound to shew that he has recovered a judgment.

INTERPLEADER to try whether certain goods taken in execution by the sheriff of York and Peel under a *fi. fa.*, delivered to him for having execution of a judgment recovered by the defendant, in an action against William Langley, were during the currency of the writ, and while it was in the hands of the sheriff, the property of the plaintiffs as against the defendant.

The issue was tried at Toronto in April last, before the Chief Justice of Upper Canada.

It appeared that the plaintiff Adamson had rented a brick yard of one Demorey, and in the summer of 1860 made bricks thereon, which, or part of which, were still on the same premises at the time of the trial. At the time of making them, Adamson lived near the brickyard, but left there in October last; but as a witness stated, he had been backwards and forwards there since. A *fi. fa.* in a cause of Holden v. Adamson was received by the sheriff of York and Peel on the 6th of January, 1860, on which bricks were seized, but the seizure was abandoned. Afterwards the same sheriff received a *fi. fa.* in a cause of Langley v.

Langley, (the writ mentioned in the interpleader order), on which these bricks were seized, which it was admitted were those Adamson had made. A chattel mortgage bearing date the 18th October, 1860, from Adamson to Holden, of three kilns of bricks, one burnt, and the other green, was proved, it was filed with the county court clerk the day after its date. It this suit only the two unburnt kilns were in question.

It was further shown that Demorey had a lease of the land, on which two of these kilns of brick were, from one Farr, and of the land on which the third kiln was from the late Mr. Patterson, and that Demorey verbally let the whole brickyard, *i. e.*, both pieces of land, to Adamson by the year, and had done so for six or seven years. On the 1st September, 1860, Adamson owed Demorey more than a year's rent at £85 per annum on the whole premises, and he employed Severs, a bailiff, to distrain. Demorey swore he never leased either of these parcels to one Powell, though Powell had paid him some rent in 1859 and 1860. That he never divided the brickyard between Adamson and Powell, or knew they had made a division. William Langley, who was Demorey's son-in-law, bought the three kilns of brick at the sale. Demorey stated that he tried to get bidders at the sale; spoke to several to bid, as Severs had once postponed the sale, because so few persons attended. Wm. Langley paid \$55, part of the purchase money, and gave Demorey a note for the balance, \$100, which is overdue and unpaid. Proof was given that several notices of the sale were put up in different places. The distress warrant was issued on the 1st of September, 1860, and the sale was before Adamson made the chattel mortgage to Holden.

The learned Chief Justice left to the jury to say—1. Had Demorey a right to distrain? 2. Did he do so, and were the bricks sold under that distress? He told them that if there was any fraudulent management with a view of preventing a fair sale, and the bailiff or Demorey was concerned in such fraud, then the sale was void, and the bricks would belong to Adamson or Holden. It seemed to the learned Chief Justice, from objections raised during the trial, that the claim by the plaintiffs was made greatly under the

impression that the bailiff's sale could not change the property, because no bill of sale was filed and no delivery was made of some brick or bricks in the name of the whole, neither of which, the Chief Justice remarked, were necessary and that Adamson had left the place, and was no longer tenant, and so in possession of the bricks.

The jury found for the defendant.

In Easter Term *Green* obtained a rule *nisi* for a new trial, because, 1st, the verdict was contrary to law and evidence. 2nd, for misdirection of the learned judge, in not directing the jury to find for the plaintiffs on the evidence, because it was proved or admitted at the trial that the claimants were in possession of the goods at the time of the seizure by the sheriff in *Langley v. Langley*, the judgment in which case was not proved, nor was Adamson a party to it. And that defendant asserts that William Langley's title is derived by purchase under a distress for rent, upon a particular day, 27th October, 1860. It was not shewn that the sale was in writing under the statute, or that there was an actual and continued change of possession. It was proved that Holden was a judgment creditor, and also a mortgagee in good faith. And it was proved that the landlord had no reversion, and it was not proved that any power or right of distress was expressly reserved by the lease, therefore all the proceedings under the distress were void. And the goods were allowed to remain on the premises beyond the usual five days without being sold and without the tenant's consent or authority.

In Trinity Term *Eccles*, Q. C. shewed cause, relying on the view taken by the learned Chief Justice at the trial, and on the finding of the jury on the question submitted to them.

M. C. Cameron, in support of the rule, principally relied on the objection that the defendant Edward Langley did not shew that he had recovered a judgment against William Langley, and could not therefore maintain the seizure of these bricks out of Adamson's possession.

DRAPER, C. J.—The Interpleader Act (Consol. Stat. U. C. ch. 30, sec. 8) enacts, that in case any claim is made to goods taken in execution by any person not being the person against whom the execution issued, a summons may be issued on the sheriff's application to bring the claimant and the execution creditor before the judge, who may order them to interplead. In the present case such proceedings must have been taken, and upon hearing all three parties, the issue was directed. Now, the question which it raises is, not whether the execution creditor had a judgment and a right to issue a writ of *fi. fa.*, but whether the goods, during the currency of the writ which has issued, and under which the sheriff seized, were the property of the claimants as against the party who issued the writ. The form of this issue assumes the right of the execution creditor to seize the goods of the debtor named in the writ by virtue of a judgment recovered against the debtor. The claimants undertake to shew that the goods seized are theirs. If they succeed it is of no consequence whether the execution creditor had recovered judgment or not; if they fail, then they had no right to contest the seizure. Success would not give them a right to damages; nothing is in question but their right of property. In my opinion this objection to the verdict fails.

It is perhaps unnecessary to advert to other points raised in this rule *nisi*, as this was the only one pressed on the argument. It may be as well, however, to note that the learned Chief Justice's notes of this trial do not shew that either of the claimants were in actual possession of the bricks at the time of the seizure by the sheriff. They were seized in the brick-yard, and there was evidence that Adamson had given that up before, in fact that his term was out, on the 1st September, 1860. Nor does it appear on the evidence that the sale on the distress was on the 27th October, 1860; it would seem to have taken place much earlier from the statements of some of the witnesses. As to the necessity of a bill of sale from the bailiff selling goods on a distress for rent, no authority has been shewn for the objection, and the statute relating to bills of sale and chattel mort-

gages has no application to *bona fide* sales by officers in the execution of process. The evidence did not, as is stated in the rule, shew that Demorey the landlord had no reversion, nor does it appear on the notes of the trial that any such point was raised. And as to the goods remaining more than five days on the premises, that may give the tenant a right to treat the landlord as a trespasser, but it will not avoid the title of a purchaser.

In my opinion the rule should be discharged.

Per cur.—Rule discharged.

PATERSON V. LANGLEY.

This was an interpleader issue to try whether certain goods seized in execution by the sheriff of York and Peel under a writ of *fi. fa.*, directed and delivered to him for having execution of a judgment recovered by defendant against William Langley, were at any time during the currency of that writ, and whilst it was in the hands of the sheriff, the property of the plaintiff as against the defendant.

The case was tried at the same assizes as the preceding case of Holden et al. v. Langley.

The plaintiff's case was, that he had purchased these bricks (being the burnt kiln mentioned in the other case) from one William Thomas, who bought them from Adamson on the 27th January, 1861, and sold them for the same price (\$4 per thousand) to the plaintiff. Adamson drew them from the brick-yard about the end of January, and put them on plaintiff's lot on Adelaide Street, in the city of Toronto, where they were seized by the sheriff, and where they remained at the time of the trial.

On the defence it was shewn that a sheriff's officer went in January, 1861, to sell these bricks as the property of Adamson, when Demorey gave him notice publicly that they were not Adamson's, but that they had been bought by and belonged to William Langley. The officer then desisted. Thomas had not paid for the bricks when he sold them to

plaintiff, who then paid for them. Demorey was called as a witness, and proved the distress and sale to Langley as in the last case. He stated, however, that Adamson's tenancy expired in the end of September or first of October, and that Adamson left the place altogether after the sale, and was not in January following in possession of the yard or the bricks.

For the plaintiff it was objected that the defendant's judgment against William Langley should be produced, and that after the expiration of five days for making the distress the sale of the bricks could not be legally made on the premises. The learned Chief Justice overruled both objections.

The learned Chief Justice told the jury to determine whether any rent was due from Adamson to Demorey when the latter distrained; and whether the bricks now in question were part of the burnt kiln sold under that distress; if so, then by that sale they became William Langley's if he bought them at that sale, and plaintiff's claim under a sale made by Adamson in January, 1861, to Thomas and by Thomas to him, conferred no title. That Demorey's statement was uncontradicted, though Adamson and Powell, who was represented to have been his partner, must know the facts, and might have been called.

The jury found a verdict for the plaintiff.

In Easter Term, *Eccles*, Q. C., obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and the judge's charge.

In the following term *M. C. Cameron* shewed cause. The argument took place at the same time with that in *Holden et al. v. Langley*. No other points were urged.

DRAPER, C. J.—I am of opinion that this verdict is wholly against evidence; and I agree entirely with the ruling at the trial as respects the necessity of the defendant's producing his judgment, and as to the sale on the premises after the expiration of five days. I have no doubt there should be a new trial, and that the costs should abide the event.

Per cur.—Rule absolute.

PERRITT V. ARNOLD.

Ejectment—Bond—Conditioned for exchange of land and deeds within a certain period—Delivery of deed—Demand of possession.

Two persons, each possessed of a lot of land agree to exchange lots; that each shall have possession of the other's lot from a day named, and that they shall exchange good and sufficient deeds in one year from the date of the bond, and each gives the other a bond with a penalty conditioned to perform the conditions above. The year elapses without either giving a deed.

Upon ejectment brought, for the lot which the plaintiff was to convey to defendant, *Held*, that the demand of possession of the premises was necessary, and probably also that the plaintiff should offer, if not actually give up, possession of the defendant's lot, which he (plaintiff) occupied under the agreement.

EJECTMENT for the south half of lot numbered 27, in the 15th concession of Sombra. The plaintiff claimed title as the grantee of John Prince, who derived title from the grantee of the Crown. The defendant claimed title as vendee of the plaintiff under an agreement dated the 7th of March, 1859.

The case was tried at Sarnia in March, 1861, before *Hagarty, J.* The plaintiff's title was admitted.

The defendant proved a bond dated the 7th of March, 1859, made by plaintiff to defendant in a penalty of \$500, with a condition, reciting that plaintiff had traded his land in the township of Sombra, being the south half of No. 27, 15th concession of Sombra, with defendant for the west half of No. 27, 10th concession, Euphemia, and had mutually agreed to allow each one to occupy the land belonging to the other at the date of the bond, from and after the 1st of April then next, and had agreed to exchange good and sufficient deeds, in one year from the date, plaintiff agreeing to cut, harvest and thresh the fall wheat then sown on the lot in Euphemia, and to deliver one-half of that crop after it was threshed and fit for market to defendant; that if plaintiff on his part well and faithfully performs the conditions above mentioned, after having been requested so to do by the defendant, the defendant being prepared, ready and willing to perform all the conditions on his part, then the obligation to be void.

On the part of the plaintiff, a witness stated that in August, 1860, he was present and heard a conversation in

which defendant said he was willing to give plaintiff a deed, and plaintiff said he was willing to give defendant a deed; that plaintiff said he would not take a deed from defendant unless he (defendant) had the patent, and defendant said that plaintiff had not got his patent either. Another witness swore that in September, 1860, defendant said plaintiff was very anxious and was urging him for his deed. The witness said plaintiff thought defendant's wife might not release her dower. Defendant said he had offered plaintiff a deed, and plaintiff would not accept it. Defendant said there was a mistake in the office, and he had to pay government \$25 more than he thought.

Then for defendant again, it was proved that in June, 1860, plaintiff came on the land and asked defendant had the patent come; that defendant said no, but he had paid for it, and thought he could give a deed then; plaintiff said no, he was in no great hurry, and would rather wait until the patent came. In August he came again, and asked if the patent had come; defendant said no; plaintiff said if the patent had not come he thought he would like his place again. The next morning defendant said he was willing to give a deed as the place was paid for; plaintiff refused to take it, saying he would take it when the patent came, and not before. Since this action was brought defendant tendered a deed with the patent.

A nonsuit was ordered with leave to plaintiff to move to enter a verdict for him if the court on this evidence thought him entitled to recover. The defendant's bond to plaintiff was put in at the close of the case; it was similar to the plaintiff's bond.

In Easter Term *M. C. Cameron* obtained a rule *nisi* to set aside the nonsuit and enter a verdict for the plaintiff on the leave reserved.

Richards, Q. C., in Trinity Term, shewed cause, citing *Arnold v. Buller*, 15 U. C. Q. B. 255; *Copp v. Holmes*, 6 C. P. U. C. 373.

M. C. Cameron, in reply, cited *Doe v. Crouch*, 5 U. C. Q. B. 453.

DRAPER, C. J.—The case may be thus stated: two persons, each possessed of a lot of land agreed to exchange lots; that each shall have possession of the other's lot from a day named, and that they shall exchange good and sufficient deeds in one year from the date of the bond, and each gives the other a bond with a penalty conditioned to perform the conditions above mentioned, the obligor having been requested to do so, and the obligee being prepared ready and willing to perform all conditions on his part; each thereupon takes possession of the other's lot, the year elapses without either giving a deed, and one brings an action of ejectment against the other without a demand of possession. Can he recover?

I think this case clearly distinguishable from that cited of *Dee v. Crouch*. Here it would seem each party was to execute to the other a conveyance of his own lot, receiving a conveyance of the lot he took in exchange. The plaintiff, without having conveyed, or offered to convey, his lot on which defendant is living, or offering to restore the possession of the defendant's lands, which, by the terms of the agreement, he had a right to occupy—brings ejectment because he has not obtained a conveyance of the defendant's lot by the stipulated time. Looking at the two bonds and the character of the transaction, it cannot be pretended that the plaintiff had a right to get a conveyance of defendant's land without making one of his own to defendant, which he has not proved, nor to get back possession of his own land without a demand of possession at least, if not something more towards rescinding the proposed exchange, and replacing the defendant in his former position.

Per cur.—Rule discharged.

PETER CLELAND V. ROBINSON, HASTINGS, ACHESON AND
OTHERS, AND GURNETT.

Trespass—Tavern—Disorderly house—Municipal institution act—Consol. Stat. U. C., ch. 54, sec. 264—Warrant—Illegally granted.

One R. laid an information before G. a police magistrate, stating that one P. G., the keeper of a tavern, duly licensed, kept a disorderly house, &c., and prayed that a warrant might issue against the said P. G., and all others found and concerned in her house. A warrant was accordingly granted by G. directed to the chief constable and all other constables of the city of Toronto, &c., commanding them to apprehend Mrs. Gardner, "and all others found and concerned in her house, to answer," &c. Under this warrant the defendants, except R. & G., went to the said house at nine o'clock of a certain evening and arrested P. G. and several other persons, among whom was the plaintiff, a traveller, who went to the house as a guest. There was no disturbance whatever in the house that evening.

On motion to set aside nonsuit, *Held*, that defendant R. having been in no way connected with the arrest of plaintiff, the nonsuit should stand as regards him, but should be set aside and a new trial granted as to all the other defendants.

TRESPASS and false imprisonment.

Pleas.—Not guilty. Statute, chapter 126, Consol. Stat. U. C., sec. 1. Writ issued 20th February, 1861.

The case was tried at Toronto spring assizes, before the Chief Justice of Upper Canada. It appeared that on the 19th December, 1860, the defendant Robinson laid an information on oath before the defendant George Gurnett, Esquire, then police magistrate for the city of Toronto, to the effect following: "He is informed and verily believes, that one Mrs. Phœbe Gardner, the keeper of an inn near to the Union Station, for which a license was issued to one James Gardner, who has left the province, is the keeper of a common disorderly and ill-governed house, to which men and women of evil repute frequent at all hours of the day and night, and in which assaults and other riotous proceedings are enacted, the same being considered a common nuisance in the neighborhood. Complainant therefore prays a warrant may issue against Mrs. Gardner and all others found and concerned in her house that justice may be done."

Upon this Mr. Gurnett issued a warrant as follows:

CITY OF TORONTO,	}	To the chief constable and all other constables of the city of Toronto, and to all, or any of the constables or peace officers within the United Counties of York and Peel.
To-wit:		

Forasmuch as Mrs. Gardner, residing foot of York street, of the city aforesaid, hath this day been charged before me, George Gurnett, Esquire, police magistrate, of the said city on the oath of a creditable witness, for that she the said Mrs. Gardner, on the 18th day of December, 1850, in the said city, did keep a common, disorderly, and ill-governed house at the foot of York street. These are therefore to command you in her Majesty's name forthwith to apprehend and bring before me, or the sitting alderman at the city police office, the body of Mrs. Gardner, and all others found and concerned in her house to answer under the said charges, and to be farther dealt with according to law. Herein fail not.

Given under my hand and seal at the city of Toronto, this 19th day of December, 1860.

(Signed,)

GEO. GURNETT, P. M. (L.S.)

It was proved that under the authority of this warrant all the defendants, except Robinson and Gurnett, about nine o'clock in the evening of the 19th December, went to Mrs. Gardner's house, which was proved to have been a duly licensed tavern, the license having been granted both for 1860 and 1861, to James Gardner, the husband of Mrs. Gardner. The house stood on the esplanade, at the corner below the bank on the east side of York street, near the Union Railway Station. The plaintiff came to the station by the cars and went to this house, as it was proved he had done before. He is a resident in the township of Medonte, carrying on business as a merchant and farmer. The defendants who went to the house were constables in the police force in the city. They arrested Mrs. Gardner, her two sisters, both married women, the plaintiff, and several other men, who were in the house; some of those arrested were in bed. There was not the slightest evidence of noise or misconduct or impropriety of any description at or immediately before the arrests. One witness, who was porter and runner to the house, and had lived there about five months, swore that he never saw anything bad about the house, but there had been two fights there some days before; as to which one of Mrs. Gardner's sisters swore, that about a week before this arrest there had been a fight there, and they sent for a police officer, who said he would have to report the house; and the

other sister swore there had been quarrelling and fighting in the house a day or two before; a drunken man came into the house and struck a man there; that Mrs. Gardner sent for a policeman, who would not come, and then the porter put the drunken man out. Gardner had been absent from home about six weeks before this occurrence. The husbands of the two sisters both lived in the house; both were in the employ of the Railway Companies—one of them was an engine driver. The plaintiff and the other men arrested were handcuffed and taken first to the police station in Yonge street and kept there until three o'clock on the following morning, when they were removed to the station at the market place, until nine o'clock, when they were detained until the case was called on. There the defendant Robinson and some other witnesses were examined, and the magistrate dismissed all of them. The three females had been allowed to return home from the police station on Yonge street on finding bail. The constables appeared to have behaved civilly and without any harshness or violence in their conduct to the different parties. It was said the night was dark, and they handcuffed the men two and two, to take them to the station.

The defendants called no witnesses. For the constables it was objected that the action must be case for malice.

That the copy of the warrant given on service of demand exonerated them from liability. As to this it had been proved that a demand had been served on each of them for a copy of the warrant under which they arrested the plaintiff. The defendant Hastings gave the original warrant up and a copy, as the authority under which he and the others acted, and obtained a receipt for the copy; none of the others gave a copy, saying that as the person who served the demand, has received a copy from Hastings, they supposed they need not give them, and he told them that perhaps each had better give a copy, but they did not.

On behalf of the defendant Robinson it was objected that he was not shewn to have committed any trespass, and as to the police magistrate, that the warrant only directs the arrest of all persons concerned. That he was not acting

under the act respecting depriving parties of tavern licenses, but under the general law respecting disorderly houses.

That the notice of action was defective.

On hearing the opinion expressed by the learned Chief Justice, and in deference thereto, the plaintiff's counsel accepted a nonsuit.

In Easter Term, *Eccles*, Q. C., obtained a rule *nisi* for a new trial on the ground that the learned Chief Justice was mistaken in ruling that the statute referred to in the margin of the pleas protected the defendants.

In Trinity Term cause was shewn.

Gwynne, Q. C., for all the defendants except Robinson and Gurnett, contended that the Consol. Stat. U. C., ch. 54, sec. 264, did not apply. He argued that the case came within the Consol. Stat. Can., ch. 105, sec. 1 and 30, and did apply to the offence charged in the information, and that the statute cited in the margin of the plea, ch. 126, of the Consol. Stat. of U. C., was the protecting statute, under which case only would lie against the constables, which act was framed partially on the English statute 11 & 12 Vic., ch. 44. He cited *Barton v. Bricknell*, 13 Q. B. 393; *Leary v. Patrick*, 15 Q. B. 266; *Newbould v. Coltman*, 6 Exch. 189. He argued that the second section could not be held to apply to the constables, and therefore as they came within the first, the only action against them must be case.

M. C. Cameron shewed cause for Robinson and Gurnett. He referred to Lord Mansfield's judgment in *Money v. Leach*, 3 Burr. 1766; *Bott v. Ackroyd*, 5 Jur. N. S. 1053.

Eccles, Q. C., supported his rule. He contended that as to Robinson, he had prayed for just such a warrant as had issued, and must be held responsible if what he obtained was illegal.

As to Gurnett, the information stated the inn was licensed, and that the person against whom the warrant was prayed was the wife of the licensee. The municipal institutions act (Consol. Stat. U. C. ch. 54, sec. 264) provides for the case of disorderly inns, enacting that the mayor or police magistrate of a town or city with any one justice of

the peace acting therein upon complaint made on oath to them of riotous or disorderly conduct in any inn situate within their jurisdiction, may summon the keeper of the inn, and may investigate the same summarily, and either dismiss the complaint or convict the innkeeper of having a riotous or disorderly house, and annul his license or suspend the same for not more than sixty days. The information is within this section and will not support the issue of a warrant. He cited *Lawrenson v. Hill*, 10 Ir. Com. L. Rep. 177, *Kendall v. Wilkinson*, 4 E. & B. 680. He contended the question was not whether the magistrate had jurisdiction over the subject matter in the information, but over the plaintiff, against whom there was no information.

As to the constables, he argued that the second section of the stat., ch. 126, must be read in connexion with the first, so as to include every class of persons mentioned in the first, or if not, the constables were performing no public duty in arresting the plaintiffs upon this warrant.

HAGARTY, J.—There are three classes of defendants, 1st, the defendant Robinson who prayed for the warrant. 2nd, the defendant Gurnett, who granted it. 3rd. The defendants, the constables, who executed it. For Messrs. Gurnett and Robinson, Mr. *Cameron* contended that in one view of this case neither information nor warrant authorised plaintiffs arrest. If this view prevail, it is necessarily fatal in my judgment to the defendants who actually arrested plaintiff.

Lord *Mansfield's* language in the celebrated case of the general warrants is clear on this head, *Money v. Leach*, 3 Burr. 1766, "where the justice cannot be liable, the officer is not within the protection of the act. The case in Middlesex concludes exactly to the present case. For here the warrant is to take up the author, printer or publisher, but they took up a person who was neither author, printer nor publisher. So that case was a warrant to take up a disorderly woman, and the defendant took up a woman who was not so. * This makes an end of the present case, for this is a previous question, and the foundation of the defence fails."

It may be most convenient to ascertain, firstly, if Mr. Gurnett in any way caused the arrest of plaintiff so as to be legally responsible for it.

The information is by defendant Robinson, on hearsay information, asking a warrant against Mrs. Gardner, keeper of the alleged disorderly house, and all others found and concerned in her house. Defendant Gurnett issues the warrant addressed to all constables generally. It states that forasmuch as Mrs. Gardner has been charged with keeping a common disorderly and ill-governed house, he directs the apprehension of Mrs. Gardner and all others found and concerned in her house to answer the charge. There was an information against Mrs. Gardner, and against no other person. The warrant may be good authority for her arrest, but as at present advised, I do not see how it can be upheld against any other person, least of all, against the plaintiff, a casual guest quietly visiting the house as a guest at a time subsequent to the charge, and in no way present at, or assisting in, any disturbance or disorder.

I doubt the right of any magistrate to issue such a warrant, and am inclined to consider it illegal. To give defendant Gurnett any jurisdiction as to plaintiff, I take it there must be some charge on oath affecting him. As police magistrate, he may have a general jurisdiction to hear any complaint against a disorderly inn or house. But the distinction is well pointed out in *Caudle v. Seymour*,¹ Q. B. 889,) Lord *Denman*, C. J., says, "The magistrate's protection depends, (as my brother *Coleridge* observes,) not on jurisdiction over the subject matter, but jurisdiction over the individual arrested. To give him that jurisdiction there should have been an information properly laid." *Coleridge*, J., "It is true that a magistrate has jurisdiction over the offence in the abstract, but to give him jurisdiction in any particular case, it must be shewn there was a proper charge upon oath in that case."

I am of opinion that there was no charge whatever against the plaintiff, and that his arrest was illegal and all persons making or commanding such arrest were trespassers and liable to plaintiff in damages. The distinction be-

tween acting illegally within the jurisdiction and acting without jurisdiction is very fully discussed and explained in *Lawrenson v. Hill*, (10 Irish C. L. Reports, 177,) cited at the bar. There the magistrate was held, in a case much weaker, I think, than this, to be a trespasser and without protection.

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The cause was taken down to trial at the last fall assizes at St. Thomas, before the Chief Justice of this court.

From the evidence given at the trial it appeared that one Joel P. Doane made a mortgage to plaintiff in May, 1849, to secure the payment of £250. The mortgage was given pursuant to an arrangement between Joel P. Doane and plaintiff's grandfather, who was the former owner of the land, plaintiff then being about 15 years of age. A memorial of the mortgage was drawn and sworn to in June, 1851, and defendants were employed to register it on plaintiff's behalf, and were paid their fees and register's charges. The defendants had in their hands at the same time for collection a demand against J. P. Doane, in favour of the late Sheriff Hamilton. Mr. Hamilton, one of the defendants, went to London with the mortgage and memorial ready for registry. Instead of placing them at once in the hands of the register, he delayed until he filed the transcript of the judgment in the division court in the suit of Hamilton v. J. P. Doane, with the clerk of the county court, and obtained a certificate of the judgment, which he gave to the register for registration, and then left plaintiff's mortgage to be registered. The mortgage appears to have been registered five minutes after the judgment. The judgment registered was for £14 10s. damages, and £2 3s. 4d. costs. This judgment was followed by an execution against the lands of J. P. Doane, on which the property, covered by the mortgage, sworn to be worth from three to five hundred pounds, was finally sold for £35, and the coroner conveyed the land to the purchaser.

The defendants objected at the trial, amongst other things, that it was not proven that there had been any registry of any of the titles to the land previous to plaintiff's mortgage, and therefore that the plaintiff's mortgage was entitled to priority, though not registered before the certificate of the judgment. This was overruled. The learned Chief Justice asked the jury to say if there was negligence in fact as to defendants' delay in registering the mortgage; and whether the defendant Hamilton wilfully postponed registering the mortgage in order to give priority to the judgment. As to damages, he directed the jury to give damages based

on the value of the land, not exceeding the value of the mortgage. The jury found for defendants as to negligence in delaying to register the mortgage until the 12th of June, 1851 ; but against them as to wilfully postponing the registering of the mortgage to give priority to the judgment, and damages were assessed at £250.

Leave was given to defendants to move to enter a nonsuit.

In Michaelmas Term last, *Crombie* moved to enter a nonsuit pursuant to leave reserved, on the grounds,

1st. That the plaintiff did not prove a registered title to the lands mentioned in the mortgage, referred to in the declaration, which was necessary to give priority to the judgment over the mortgage.

2. That the mortgage having been executed in 1849, and the memorial in 1850, the registration of the judgment prior to that of the mortgage, did not affect the validity of the latter, or prejudice the plaintiff.

During last Hilary Term, *Richards*, Q. C., shewed cause, and contended that plaintiff was clearly entitled to some damages for the breach of contract or duty on part of defendants, and if so there could be no nonsuit. He admitted he could not distinguish this from some of the cases decided under the registry law, wherein it was held that the registry of the judgment was only a charge on the land, and did not bind it for purposes of sale under the execution issued on the judgment. But he urged, as this objection was not taken at *nisi prius*, and the rule is not moved on this ground, the court ought not to interfere to relieve the defendants under the circumstances of this case. That although the decided cases may have gone to the extent of holding that the registry of a judgment would only create a charge to the amount of the judgment, to plaintiff's prejudice, yet that the law is by no means settled on the point, and plaintiff ought not to be put to the risk of losing his debt, inasmuch as defendant's act, which has operated to his prejudice, was wilful, and in law a fraud on him. That if defendants would pay the amount of the mortgage debt plaintiff would

other sister swore there had been quarrelling and fighting in the house a day or two before ; a drunken man came into the house and struck a man there ; that Mrs. Gardner sent for a policeman, who would not come, and then the porter put the drunken man out. Gardner had been absent from home about six weeks before this occurrence. The husbands of the two sisters both lived in the house ; both were in the employ of the Railway Companies—one of them was an engine driver. The plaintiff and the other men arrested, were handcuffed and taken first to the police station in Yonge street and kept there until three o'clock on the following morning, when they were removed to the station at the market place, until nine o'clock, when they were detained until the case was called on. There the defendant Robinson and some other witnesses were examined, and the magistrate dismissed all of them. The three females had been allowed to return home from the police station on Yonge street on finding bail. The constables appeared to have behaved civilly and without any harshness or violence in their conduct to the different parties. It was said the night was dark, and they handcuffed the men two and two, to take them to the station.

The defendants called no witnesses. For the constables it was objected that the action must be case for malice.

That the copy of the warrant given on service of demand exonerated them from liability. As to this it had been proved that a demand had been served on each of them for a copy of the warrant under which they arrested the plaintiff. The defendant Hastings gave the original warrant up and a copy, as the authority under which he and the others acted, and obtained a receipt for the copy ; none of the others gave a copy, saying that as the person who served the demand, has received a copy from Hastings, they supposed they need not give them, and he told them that perhaps each had better give a copy, but they did not.

On behalf of the defendant Robinson it was objected that he was not shewn to have committed any trespass, and as to the police magistrate, that the warrant only directs the arrest of all persons concerned. That he was not acting

under the act respecting depriving parties of tavern licenses, but under the general law respecting disorderly houses.

That the notice of action was defective.

On hearing the opinion expressed by the learned Chief Justice, and in deference thereto, the plaintiff's counsel accepted a nonsuit.

In Easter Term, *Eccles*, Q. C., obtained a rule *nisi* for a new trial on the ground that the learned Chief Justice was mistaken in ruling that the statute referred to in the margin of the pleas protected the defendants.

In Trinity Term cause was shewn.

Gwynne, Q. C., for all the defendants except Robinson and Gurnett, contended that the Consol. Stat. U. C., ch. 54, sec. 264, did not apply. He argued that the case came within the Consol. Stat. Can., ch. 105, sec. 1 and 30, and did apply to the offence charged in the information, and that the statute cited in the margin of the plea, ch. 126, of the Consol. Stat. of U. C., was the protecting statute, under which case only would lie against the constables, which act was framed partially on the English statute 11 & 12 Vic., ch. 44. He cited *Barton v. Bricknell*, 13 Q. B. 393; *Leary v. Patrick*, 15 Q. B. 266; *Newbould v. Coltman*, 6 Exch. 189. He argued that the second section could not be held to apply to the constables, and therefore as they came within the first, the only action against them must be case.

M. C. Cameron showed cause for Robinson and Gurnett. He referred to Lord Mansfield's judgment in *Money v. Leach*, 3 Burr. 1766; *Bott v. Ackroyd*, 5 Jur. N. S. 1053.

Eccles, Q. C., supported his rule. He contended that as to Robinson, he had prayed for just such a warrant as had issued, and must be held responsible if what he obtained was illegal.

As to Gurnett, the information stated the inn was licensed, and that the person against whom the warrant was prayed was the wife of the licensee. The municipal institutions act (Consol. Stat. U. C. ch. 54, sec. 264) provides for the case of disorderly inns, enacting that the mayor or police magistrate of a town or city with any one justice of

the peace acting therein upon complaint made on oath to them of riotous or disorderly conduct in any inn situate within their jurisdiction, may summon the keeper of the inn, and may investigate the same summarily, and either dismiss the complaint or convict the innkeeper of having a riotous or disorderly house, and annul his license or suspend the same for not more than sixty days. The information is within this section and will not support the issue of a warrant. He cited *Lawrenson v. Hill*, 10 Ir. Com. L. Rep. 177, *Kendall v. Wilkinson*, 4 E. & B. 680. He contended the question was not whether the magistrate had jurisdiction over the subject matter in the information, but over the plaintiff, against whom there was no information.

As to the constables, he argued that the second section of the stat., ch. 126, must be read in connexion with the first, so as to include every class of persons mentioned in the first, or if not, the constables were performing no public duty in arresting the plaintiffs upon this warrant.

HAGARTY, J.—There are three classes of defendants, 1st, the defendant Robinson who prayed for the warrant. 2nd, the defendant Gurnett, who granted it. 3rd. The defendants, the constables, who executed it. For Messrs. Gurnett and Robinson, Mr. *Cameron* contended that in one view of this case neither information nor warrant authorised plaintiffs arrest. If this view prevail, it is necessarily fatal in my judgment to the defendants who actually arrested plaintiff.

Lord *Mansfield's* language in the celebrated case of the general warrants is clear on this head, *Money v. Leach*, 3 Burr. 1766, "where the justice cannot be liable, the officer is not within the protection of the act. The case in Middlesex concludes exactly to the present case. For here the warrant is to take up the author, printer or publisher, but they took up a person who was neither author, printer nor publisher. So that case was a warrant to take up a disorderly woman, and the defendant took up a woman who was not so. * This makes an end of the present case, for this is a previous question, and the foundation of the defence fails."

It may be most convenient to ascertain, firstly, if Mr. Gurnett in any way caused the arrest of plaintiff so as to be legally responsible for it.

The information is by defendant Robinson, on hearsay information, asking a warrant against Mrs. Gardner, keeper of the alleged disorderly house, and all others found and concerned in her house. Defendant Gurnett issues the warrant addressed to all constables generally. It states that forasmuch as Mrs. Gardner has been charged with keeping a common disorderly and ill-governed house, he directs the apprehension of Mrs. Gardner and all others found and concerned in her house to answer the charge. There was an information against Mrs. Gardner, and against no other person. The warrant may be good authority for her arrest, but as at present advised, I do not see how it can be upheld against any other person, least of all, against the plaintiff, a casual guest quietly visiting the house as a guest at a time subsequent to the charge, and in no way present at, or assisting in, any disturbance or disorder.

I doubt the right of any magistrate to issue such a warrant, and am inclined to consider it illegal. To give defendant Gurnett any jurisdiction as to plaintiff, I take it there must be some charge on oath affecting him. As police magistrate, he may have a general jurisdiction to hear any complaint against a disorderly inn or house. But the distinction is well pointed out in *Caudle v. Seymour*,¹ Q. B. 889,) Lord *Denman*, C. J., says, "The magistrate's protection depends, (as my brother *Coleridge* observes,) not on jurisdiction over the subject matter, but jurisdiction over the individual arrested. To give him that jurisdiction there should have been an information properly laid." *Coleridge*, J., "It is true that a magistrate has jurisdiction over the offence in the abstract, but to give him jurisdiction in any particular case, it must be shewn there was a proper charge upon oath in that case."

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Quæst. would not the amount of the judgment with interest, costs, &c., be the measure of damages in the action.

ACTION against attorneys for negligence in omitting to register a mortgage for £250, until after they had caused a judgment for £16 13s. 4d. to be registered against the lands of the mortgagor, covered by the said mortgage, thereby making the same a charge upon the said lands prior to the mortgage; and until the defendant had caused a *fi. fa.* against lands to be sued out against the lands of the mortgagor, and the said lands so mortgaged to be sold under the said writ, whereby plaintiff lost his lien or charge upon the said lands by virtue of the mortgage, and was deprived of the sum of money mentioned therein, and is otherwise injured. He claimed damages, £350.

Defendants pleaded, 1st, not guilty.

2nd, that plaintiff did not retain defendant as in declaration alleged.

The cause was taken down to trial at the last fall assizes at St. Thomas, before the Chief Justice of this court.

From the evidence given at the trial it appeared that once Joel P. Doane made a mortgage to plaintiff in May, 1849, to secure the payment of £250. The mortgage was given pursuant to an arrangement between Joel P. Doane and plaintiff's grandfather, who was the former owner of the land, plaintiff then being about 15 years of age. A memorial of the mortgage was drawn and sworn to in June, 1851, and defendants were employed to register it on plaintiff's behalf, and were paid their fees and register's charges. The defendants had in their hands at the sametime for collection a demand against J. P. Doane, in favour of the late Sheriff Hamilton. Mr. Hamilton, one of the defendants, went to London with the mortgage and memorial ready for registry. Instead of placing them at once in the hands of the register, he delayed until he filed the transcript of the judgment in the division court in the suit of Hamilton v. J. P. Doane, with the clerk of the county court, and obtained a certificate of the judgment, which he gave to the register for registration, and then left plaintiff's mortgage to be registered. The mortgage appears to have been registered five minutes after the judgment. The judgment registered was for £14 10s. damages, and £2 3s. 4d. costs. This judgment was followed by an execution against the lands of J. P. Doane, on which the property, covered by the mortgage, sworn to be worth from three to five hundred pounds, was finally sold for £35, and the coroner conveyed the land to the purchaser.

The defendants objected at the trial, amongst other things, that it was not proven that there had been any registry of any of the titles to the land previous to plaintiff's mortgage, and therefore that the plaintiff's mortgage was entitled to priority, though not registered before the certificate of the judgment. This was overruled. The learned Chief Justice asked the jury to say if there was negligence in fact as to defendants' delay in registering the mortgage; and whether the defendant Hamilton wilfully postponed registering the mortgage in order to give priority to the judgment. As to damages, he directed the jury to give damages based

on the value of the land, not exceeding the value of the mortgage. The jury found for defendants as to negligence in delaying to register the mortgage until the 12th of June, 1851 ; but against them as to wilfully postponing the registering of the mortgage to give priority to the judgment, and damages were assessed at £250.

Leave was given to defendants to move to enter a non-suit.

In Michaelmas Term last, *Crombie* moved to enter a non-suit pursuant to leave reserved, on the grounds,

1st. That the plaintiff did not prove a registered title to the lands mentioned in the mortgage, referred to in the declaration, which was necessary to give priority to the judgment over the mortgage.

2. That the mortgage having been executed in 1849, and the memorial in 1850, the registration of the judgment prior to that of the mortgage, did not affect the validity of the latter, or prejudice the plaintiff.

During last Hilary Term, *Richards*, Q. C., shewed cause, and contended that plaintiff was clearly entitled to some damages for the breach of contract or duty on part of defendants, and if so there could be no nonsuit. He admitted he could not distinguish this from some of the cases decided under the registry law, wherein it was held that the registry of the judgment was only a charge on the land, and did not bind it for purposes of sale under the execution issued on the judgment. But he urged, as this objection was not taken at *nisi prius*, and the rule is not moved on this ground, the court ought not to interfere to relieve the defendants under the circumstances of this case. That although the decided cases may have gone to the extent of holding that the registry of a judgment would only create a charge to the amount of the judgment, to plaintiff's prejudice, yet that the law is by no means settled on the point, and plaintiff ought not to be put to the risk of losing his debt, inasmuch as defendant's act, which has operated to his prejudice, was wilful, and in law a fraud on him. That if defendants would pay the amount of the mortgage debt plaintiff would

assign the mortgage to them, and not further prosecute the action. That this would be doing substantial justice, and if defendants refused to do this, the court ought not to interfere for their relief.

Crombie, contra, contended, that under the authority of the decided cases, it was clear that the plaintiff could only be prejudiced to the amount of the registered judgment; that the sale under the execution would be subject to the mortgage, and it would be unjust to allow this verdict to stand. That as to the form of the rule if the court decided, plaintiff was not entitled to a nonsuit on the ground taken at the trial, they would still order a new trial for excess of damages.

The following authorities were referred to: *Broom's Commentaries*, 843; *Godefroy v. Jay*, 7 Bing. 413; *Wylie v. Birch*, 4 Q. B. 578; *Dougall v. Fanning*, 8 U. C. 166; *Doe Dempsey v. Boulton*, 9 U. C. 532; *Brogden v. Collins*, 7 U. C. C. P. 61; *Bethune v. Caulcutt*, 1 Grant, Chancery, 81; *McMaster v. Phipps*, 5 ditto, 253; *Thirkell v. Patterson*, 18 Q. B. 75; *McQuestein v. Campbell*, 8 Grant, 242-3; *Marzetti v. Williams*, 1 B. & Ad. 415.

RICHARDS, J.—The first point for consideration on the motion to enter a nonsuit is whether the action lies. If the action lies, though merely nominal damages be recoverable, the defendants' rule cannot be made absolute in its terms. It will not be necessary to consider the law on the subject of registered judgments unless we come to the conclusion that we would be warranted in moulding the defendants' rule so as to grant a new trial for excessive damages.

In *Godefroy v. Jay*, 7 Bing. 413, an action brought against an attorney for negligence for not putting in a defence after having been retained so to do, it was contended, as the action was one of *tort*, no action would lie for mere negligence, unaccompanied with assignable damages, and that it was therefore for the plaintiff to shew that he had been injured by the defendants' misconduct.

Tindal, C. J., referring to *Marzetti v. Williams*, 1 B. & Adol. 415, said that was an action of *tort* arising out of the breach

of an implied contract, and the plaintiff was allowed to recover, although he proved no damage. In giving judgment in the same case, Chief Justice *Tindal* further remarked—"It has been thrown out on behalf of the defendant that no action lies for negligence, unless the plaintiff shew special damage. But that proposition is wider than the law warrants; for in an action of *tort* arising out of a breach of contract or neglect of a duty which the law imposes, nominal damages are sufficient to entitle the plaintiff to judgment." *Park, J.*, in the same case observes, "The position that special damage ought to be shewn to entitle the plaintiff to recover in an action of *tort* is not correct. The contrary has been established by the recent case of *Marzetti v. Williams*, 1 B. & Ad. 415; and that is not a new decision, for it has always been holden that when an action arises substantially on a contract, any breach is sufficient to entitle the plaintiff to nominal damages."

In *Howell v. Young*, 5 B. & C. 265, which was an action against an attorney for negligence, *Bayley, J.*, says: "It appears to me that there is not any substantial distinction between an action of assumpsit founded upon a promise which the law implies, that a party will do that which he is legally liable to perform, and an action on the case which is founded expressly on a breach of duty; whatever be the form of action the breach of duty is substantially the cause of action."

In *Marzetti v. Williams*, 1 B. & Adol. 415, which was an action on the case against the defendants for refusing to honor a cheque of the plaintiffs when they had funds in their hands, *Park, J.*, says, "This action being substantially founded on a contract, I think it can make no difference whether it is in form *tort* or assumpsit. It is admitted that when there is a breach of an express contract, nominal damages may be recovered. The only difference between an express and implied contract, is as to the mode of proof. An express contract is proved by direct evidence—an implied contract by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the legal consequences resulting from the breach of it must be

assign the mortgage to them, and not further prosecute the action. That this would be doing substantial justice, and if defendants refused to do this, the court ought not to interfere for their relief.

Crombie, contra, contended, that under the authority of the decided cases, it was clear that the plaintiff could only be prejudiced to the amount of the registered judgment; that the sale under the execution would be subject to the mortgage, and it would be unjust to allow this verdict to stand. That as to the form of the rule if the court decided, plaintiff was not entitled to a nonsuit on the ground taken at the trial, they would still order a new trial for excess of damages.

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Tindal, C. J., referring to *Marzetti v. Williams*, 1 B. & Ad. 415, said that was an action of *tort* arising out of the breach

of an implied contract, and the plaintiff was allowed to recover, although he proved no damage. In giving judgment in the same case, Chief Justice *Tindal* further remarked—"It has been thrown out on behalf of the defendant that no action lies for negligence, unless the plaintiff shew special damage. But that proposition is wider than the law warrants; for in an action of *tort* arising out of a breach of contract or neglect of a duty which the law imposes, nominal damages are sufficient to entitle the plaintiff to judgment." *Park, J.*, in the same case observes, "The position that special damage ought to be shewn to entitle the plaintiff to recover in an action of *tort* is not correct. The contrary has been established by the recent case of *Marzetti v. Williams*, 1 B. & Ad. 415; and that is not a new decision, for it has always been holden that when an action arises substantially on a contract, any breach is sufficient to entitle the plaintiff to nominal damages."

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assign the mortgage to them, and not further prosecute the action. That this would be doing substantial justice, and if defendants refused to do this, the court ought not to interfere for their relief.

Crombie, contra, contended, that under the authority of the decided cases, it was clear that the plaintiff could only be prejudiced to the amount of the registered judgment; that the sale under the execution would be subject to the mortgage, and it would be unjust to allow this verdict to stand. That as to the form of the rule if the court decided, plaintiff was not entitled to a nonsuit on the ground taken at the trial, they would still order a new trial for excess of damages.

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of an implied contract, and the plaintiff was allowed to recover, although he proved no damage. In giving judgment in the same case, Chief Justice *Tindal* further remarked—"It has been thrown out on behalf of the defendant that no action lies for negligence, unless the plaintiff shew special damage. But that proposition is wider than the law warrants; for in an action of *tort* arising out of a breach of contract or neglect of a duty which the law imposes, nominal damages are sufficient to entitle the plaintiff to judgment." *Park*, J., in the same case observes, "The position that special damage ought to be shewn to entitle the plaintiff to recover in an action of *tort* is not correct. The contrary has been established by the recent case of *Marzetti v. Williams*, 1 B. & Ad. 415; and that is not a new decision, for it has always been holden that when an action arises substantially on a contract, any breach is sufficient to entitle the plaintiff to nominal damages."

In *Howell v. Young*, 5 B. & C. 265, which was an action against an attorney for negligence, *Bayley*, J., says: "It appears to me that there is not any substantial distinction between an action of *assumpsit* founded upon a promise which the law implies, that a party will do that which he is legally liable to perform, and an action on the case which is founded expressly on a breach of duty; whatever be the form of action the breach of duty is substantially the cause of action."

In *Marzetti v. Williams*, 1 B. & Adol. 415, which was an action on the case against the defendants for refusing to honor a cheque of the plaintiffs when they had funds in their hands, *Park*, J., says, "This action being substantially founded on a contract, I think it can make no difference whether it is in form *tort* or *assumpsit*. It is admitted that when there is a breach of an express contract, nominal damages may be recovered. The only difference between an express and implied contract, is as to the mode of proof. An express contract is proved by direct evidence—an implied contract by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the legal consequences resulting from the breach of it must be

the same; one is that wherever there is a breach of contract or any injury to the right arising out of that contract, nominal damages are recoverable. An extreme case may be put where a party who had sustained no inconvenience might bring an action, but the remedy in that case would be to deprive such party of costs." *Patteson, J.*, in referring to express and implied contracts, concludes as follows: "As soon as it is made out either by direct or circumstantial evidence, that there was such a contract, either of the parties may maintain an action against the other without shewing any *actual damage*."

These authorities seem to me clearly to establish that this action is substantially one for a breach of a contract; the breach having been clearly established, the plaintiff, without shewing more, is entitled to recover nominal damages; we cannot, therefore make the rule absolute in its present form to enter a nonsuit.

Having arrived at the conclusion that a nonsuit could not be entered, we were prepared to adopt the suggestion thrown out by *Mr. Richards* on the argument, and discharge the rule on the plaintiff assigning the mortgage to the defendants, and the case stood over for the purpose of communicating with the parties on the subject.

We are now informed that since the verdict was recovered, the plaintiff, in consideration of \$300 paid to him by the executor of one *Mills*, who was the purchaser of the lot at the sale, under Sheriff *Hamilton's* execution, released and discharged the mortgage, and that this release has been registered in the proper registry office. The plaintiff does not deny the fact of the release, but contends that by signing it he did not intend to discharge the defendants from the verdict rendered against them, and that the release was procured by the advice and with the co-operation of the defendants, with the intention of prejudicing the plaintiff in relation to his verdict.

It is very obvious that we cannot try on affidavit the question whether there was any fraud on behalf of the defendants in procuring the discharge of the mortgage spoken of. If the plaintiff had been content to rest satisfied with his

verdict, and had not taken such steps as prevents him from putting the defendants, as to the mortgage, in the same position that he was when the verdict was obtained, we should not have thought it our duty to interfere to relieve the defendants, though we might have felt ourselves bound by the cases referred to on the argument to decide that the judgment registered would operate as a charge on the land, and could prejudicially affect the plaintiff only to the amount of that judgment, interest, &c. But the plaintiff having changed his position by his own act, we think all the facts ought to be submitted to the consideration of another jury that they may say what damages they will give him for the breach of duty complained of, and clearly proven at the trial. The plaintiff will then doubtless supply the evidence necessary to shew the title a registered one, and if he succeeds in setting aside the release as fraudulent, as we were told he contemplated doing, he can place his case again before the jury as favorably as he did at the last trial; if not more so. If he does not succeed in setting aside the release, and yet chooses to take the cause down to trial a second time, he can bring all the facts before the jury, and they will give him such damages under the direction of the presiding judge as they think reasonable and just.

The defendants' rule will therefore be made absolute, but will be moulded so as to be a rule for a new trial on payment of costs.

Rule accordingly.

MEIN ET AL. V. SHORT, ET AL., ADMINISTRATORS OF WEST.
Practice—Revision of costs—Amendment of judgment roll—Plea—Plene administravit.

Action against administrators on several counts, to which defendants pleaded, 1st. *Plene administraverunt propter*, a division court judgment for £20, and that goods of intestate in their hands are subject to, and insufficient to pay said judgment. 2nd. Payment of £55, before action brought in satisfaction of so much of plaintiffs' claim. 3rd. Set-off. Plaintiffs took issue on each plea, and to the first also replied, lands of the intestate to be administered. Defendants rejoined, admitting the intestate died seized of lands, but denied that they had any power to deal with them, and praying against judgment *de bonis propriis*; to which replication the plaintiffs demurred. Afterwards, defendants further pleaded the recovery of five judgments against them as administrators, and remaining unsatisfied and no effects sufficient. Plaintiffs replied that one judgment was obtained by fraud, and took issue as to the others.

The court decided for defendants on the demurrer. A verdict was rendered for plaintiffs on the issues subject to award, costs, &c., to abide the event of the award. Award found issue joined on the plea of *plene administraverunt*, and the pleas of payment in favor of defendant. On the plea of set-off, defendants were entitled to £5, leaving balance in plaintiffs' favor of £220 ls. 1d., which sum was awarded to plaintiffs. The remaining issues were awarded to defendants. Judgment was entered by plaintiffs on award, and £44 12s. 11d. costs was taxed to plaintiffs, and £10 18s. 2d. to defendants for costs of issue found in their favor. Judgment was entered up for £220 ls. 1d., to be levied of the goods of intestate, and £33 14s. 9d., balance of costs, to be levied of the defendants' own goods.

On a motion for revision of costs, and amendment of judgment roll, *Held*, that defendants are only entitled to judgment on the issues determined in their favor with their costs of cause relating to such issues while plaintiffs are entitled to judgment as against the estate of intestate for the amount found due on plea of set-off with the general costs of the cause, except as to issue found against him, and for the costs of the issue on the plea of set-off against the defendants *de bonis propriis*.

D. B. Read, Q. C., obtained a rule in Easter Term calling on the plaintiffs to shew cause why the costs should not be revised and the judgment roll amended by awarding to the defendants the costs of the cause, and confining the plaintiffs to the costs of the issue on the plea of set-off, and the writ of executions, and all proceedings to be amended accordingly, or why the rolls should not be amended so as to make the costs of the cause if the plaintiff is entitled to the same to be levied of the lands of the intestate, and to acquit the defendants thereof out of their own estate, or so as not to make them personally liable therefor, on the ground that the award and amended award in this cause and the pleadings do not warrant the entry of the judgment in the cause,

as it has been entered in respect of costs, or why the plaintiffs should not be deprived of costs incurred by them subsequent to the 20th of December, 1859, on the ground that up to that day there was a plea of *plene administravit* on the record, and an issue thereon, which was afterwards found for defendants, and on grounds disclosed in affidavits and papers filed.

The action was brought against defendants as administrators of Joseph West, upon a promissory note, and for other causes of action against West, and upon accounts stated respecting these different demands between the plaintiffs and West, and the plaintiffs and the defendants as administrators, the defendants pleaded *plene administraverunt præter*, a division court judgment for £20, which remained unsatisfied, and that the goods of West, in defendants' hands were subject to said judgment and insufficient to satisfy it. 2nd. Payment of £55, before action in satisfaction of so much of plaintiffs' claim. 3rd. Set-off. Issue was taken on each plea, and to the first the plaintiffs also replied lands of the intestate in the hands of the defendants to be administered, to which the defendants rejoined, admitting that the intestate died seized of lands, but denying that they had any power or authority to deal with them, and praying that plaintiffs might not take judgment against them *de bonis propriis*, to which replication the plaintiffs demurred.

On the 11th of April, 1859, the defendants further pleaded the recovery of five different judgments against them in their representative capacity which remained unsatisfied, and no assets sufficient, to which plaintiffs replied that one judgment was obtained by fraud, and took issue as to the others.

In Easter Term the court decided the demurrer in favor of the defendants. A verdict was rendered for plaintiffs on the issues subject to award, the costs of the reference and of the award to abide the event of the award. The arbitrator awarded that the first issue joined on the plea of *plene administraverunt* should be entered for defendants; that the issue on the plea of payment should be entered for defendant; that on the issue on the plea of set-off defendants were entitled to five pounds, leaving a balance in plaintiffs' favor

of £220 1s. 1d., which sum he found and awarded to be due to the plaintiffs, and he awarded that the remaining issues should be entered for defendants. On this award the plaintiffs entered up judgment, and the master taxed costs to the plaintiffs £44 12s. 11d., and to the defendants £10 18s. 2d., for the costs of issues found in their favor. The judgment was entered for £220 1s. 1d., to be levied of the goods, &c., of West, which should thereafter come into the defendants' hands to be administered, and £33 14s. 9d., being the balance of the plaintiffs' costs to be levied of the defendants' own goods. The agent for the defendants' attorney made oath, that the plaintiffs' demurrer was withdrawn, but not the taking the issue on the replication, and consequently when the arbitrator made his award not disposing of the several issues, the defendants moved to set aside the award, and it was referred back to him, and he made the award as set out above, on which the defendants contended before the master at the taxation that they were entitled to the *postea* and costs of the cause.

In Trinity term cause was shewn to the rule by *N. Kingsmill*, and *D. B. Read*, Q. C., supported it. The following cases were referred to:—*Edwards v. Bethel*, 1 B. & Al. 254; *Marshall v. Willdor*, 9 B. & C. 657; *Dearne v. Grimp*, 3 Wm. B. 1275.

DRAPER, C. J.—The defendants have not denied the debt claimed to be due from their intestate, and have not therefore put the plaintiffs to the necessity of a trial to establish their claim.

The plaintiffs took issue on the two pleas of *plene administraverunt præter* pleaded by the defendants, thereby putting the latter to proof of their pleas, and as to one of the judgments pleaded the plaintiffs replied fraud, thereby rendering a trial necessary. But the defendants succeeded on all the issues raised on these pleas, and became consequently entitled to recover their costs against the plaintiffs who can have no right to recover any costs upon these issues against the intestate's estate.

The defendants also pleaded a limited plea of payment of £55, on which the plaintiffs took issue. Here, too, the defendants succeeded, and the same consequences as to costs must follow.

Lastly, the defendants pleaded a set-off to the whole claim. The plaintiffs traversed this plea, but the defendants established a set-off to only a small part of the demand. The finding on this issue was therefore for the plaintiffs for the amount due them less the set-off proved. On this issue the plaintiffs are entitled to judgment, for the amount found due as against the estate of the intestate, with the plaintiffs general costs of the cause, and as to the costs of this issue against the defendants *de bonis propriis*.

Notwithstanding their failure on the plea of set-off, the defendants would, I apprehend, according to English practice, be entitled by reason of their succeeding on the plea of *plene administravit*, to a general judgment, and the general costs of the cause. But this would be inconsistent with the decisions which have established a plaintiff's right to judgment and execution against the lands of a testator or intestate, in an action against the executors or administrators, where either the debt is not denied, or if denied is established, for a general judgment in favor of the defendants would defeat this right, and as it has also been decided that the action could not be maintained against the heir or devisee of the lands, the statute of 5 Geo. II. would not have its effect.

Hence, it appears to me, the defendants can only have judgment in their favor on the issues determined for them, with their costs of the cause, as relating to such issues, while the plaintiffs are entitled to judgment as against the estate of the intestate for the amount found due on the plea of set-off, with the general costs of the cause, except as to issues found against them, and for the costs of the issue on the plea of set-off against the defendants *de bonis propriis*.

There is inevitably some complication in this, but it arises from the right of the plaintiffs to recover their claim against the intestate, out of his lands, in a suit against the administrators, and from the right of the administrators to be pro-

The cause was taken down to trial at the last fall assizes at St. Thomas, before the Chief Justice of this court.

From the evidence given at the trial it appeared that one Joel P. Doane made a mortgage to plaintiff in May, 1849, to secure the payment of £250. The mortgage was given pursuant to an arrangement between Joel P. Doane and plaintiff's grandfather, who was the former owner of the land, plaintiff then being about 15 years of age. A memorial of the mortgage was drawn and sworn to in June, 1851, and defendants were employed to register it on plaintiff's behalf, and were paid their fees and register's charges. The defendants had in their hands at the same time for collection a demand against J. P. Doane, in favour of the late Sheriff Hamilton. Mr. Hamilton, one of the defendants, went to London with the mortgage and memorial ready for registry. Instead of placing them at once in the hands of the register, he delayed until he filed the transcript of the judgment in the division court in the suit of Hamilton v. J. P. Doane, with the clerk of the county court, and obtained a certificate of the judgment, which he gave to the register for registration, and then left plaintiff's mortgage to be registered. The mortgage appears to have been registered five minutes after the judgment. The judgment registered was for £14 10s. damages, and £2 3s. 4d. costs. This judgment was followed by an execution against the lands of J. P. Doane, on which the property, covered by the mortgage, sworn to be worth from three to five hundred pounds, was finally sold for £35, and the coroner conveyed the land to the purchaser.

The defendants objected at the trial, amongst other things, that it was not proven that there had been any registry of any of the titles to the land previous to plaintiff's mortgage, and therefore that the plaintiff's mortgage was entitled to priority, though not registered before the certificate of the judgment. This was overruled. The learned Chief Justice asked the jury to say if there was negligence in fact as to defendants' delay in registering the mortgage; and whether the defendant Hamilton wilfully postponed registering the mortgage in order to give priority to the judgment. As to damages, he directed the jury to give damages based

on the value of the land, not exceeding the value of the mortgage. The jury found for defendants as to negligence in delaying to register the mortgage until the 12th of June, 1851 ; but against them as to wilfully postponing the registering of the mortgage to give priority to the judgment, and damages were assessed at £250.

Leave was given to defendants to move to enter a nonsuit.

In Michaelmas Term last, *Crombie* moved to enter a nonsuit pursuant to leave reserved, on the grounds,

- 1st. That the plaintiff did not prove a registered title to the lands mentioned in the mortgage, referred to in the declaration, which was necessary to give priority to the judgment over the mortgage.

2. That the mortgage having been executed in 1849, and the memorial in 1850, the registration of the judgment prior to that of the mortgage, did not affect the validity of the latter, or prejudice the plaintiff.

During last Hilary Term, *Richards*, Q. C., shewed cause, and contended that plaintiff was clearly entitled to some damages for the breach of contract or duty on part of defendants, and if so there could be no nonsuit. He admitted he could not distinguish this from some of the cases decided under the registry law, wherein it was held that the registry of the judgment was only a charge on the land, and did not bind it for purposes of sale under the execution issued on the judgment. But he urged, as this objection was not taken at *nisi prius*, and the rule is not moved on this ground, the court ought not to interfere to relieve the defendants under the circumstances of this case. That although the decided cases may have gone to the extent of holding that the registry of a judgment would only create a charge to the amount of the judgment, to plaintiff's prejudice, yet that the law is by no means settled on the point, and plaintiff ought not to be put to the risk of losing his debt, inasmuch as defendant's act, which has operated to his prejudice, was wilful, and in law a fraud on him. That if defendants would pay the amount of the mortgage debt plaintiff would

assign the mortgage to them, and not further prosecute the action. That this would be doing substantial justice, and if defendants refused to do this, the court ought not to interfere for their relief.

Crombie, contra, contended, that under the authority of the decided cases, it was clear that the plaintiff could only be prejudiced to the amount of the registered judgment; that the sale under the execution would be subject to the mortgage, and it would be unjust to allow this verdict to stand. That as to the form of the rule if the court decided, plaintiff was not entitled to a nonsuit on the ground taken at the trial, they would still order a new trial for excess of damages.

The following authorities were referred to: *Broom's Commentaries*, 843; *Godefroy v. Jay*, 7 Bing. 413; *Wylie v. Birch*, 4 Q. B. 578; *Dougall v. Fanning*, 8 U. C. 166; *Doe Dempsey v. Boulton*, 9 U. C. 532; *Brogden v. Collins*, 7 U. C. C. P. 61; *Bethune v. Caulcutt*, 1 Grant, Chancery, 81; *McMaster v. Phipps*, 5 ditto, 253; *Thirkell v. Patterson*, 18 Q. B. 75; *McQuestein v. Campbell*, 8 Grant, 242-3; *Marzetti v. Williams*, 1 B. & Ad. 415.

RICHARDS, J.—The first point for consideration on the motion to enter a nonsuit is whether the action lies. If the action lies, though merely nominal damages be recoverable, the defendants' rule cannot be made absolute in its terms. It will not be necessary to consider the law on the subject of registered judgments unless we come to the conclusion that we would be warranted in moulding the defendants' rule so as to grant a new trial for excessive damages.

In *Godefroy v. Jay*, 7 Bing. 413, an action brought against an attorney for negligence for not putting in a defence after having been retained so to do, it was contended, as the action was one of *tort*, no action would lie for mere negligence, unaccompanied with assignable damages, and that it was therefore for the plaintiff to shew that he had been injured by the defendants' misconduct.

Tindal, C. J., referring to *Marzetti v. Williams*, 1 B. & Adol. 415, said that was an action of *tort* arising out of the breach

of an implied contract, and the plaintiff was allowed to recover, although he proved no damage. In giving judgment in the same case, Chief Justice *Tindal* further remarked—"It has been thrown out on behalf of the defendant that no action lies for negligence, unless the plaintiff shew special damage. But that proposition is wider than the law warrants; for in an action of *tort* arising out of a breach of contract or neglect of a duty which the law imposes, nominal damages are sufficient to entitle the plaintiff to judgment." *Park, J.*, in the same case observes, "The position that special damage ought to be shewn to entitle the plaintiff to recover in an action of *tort* is not correct. The contrary has been established by the recent case of *Marzetti v. Williams*, 1 B. & Ad. 415; and that is not a new decision, for it has always been holden that when an action arises substantially on a contract, any breach is sufficient to entitle the plaintiff to nominal damages."

In *Howell v. Young*, 5 B. & C. 265, which was an action against an attorney for negligence, *Bayley, J.*, says: "It appears to me that there is not any substantial distinction between an action of assumpsit founded upon a promise which the law implies, that a party will do that which he is legally liable to perform, and an action on the case which is founded expressly on a breach of duty; whatever be the form of action the breach of duty is substantially the cause of action."

In *Marzetti v. Williams*, 1 B. & Adol. 415, which was an action on the case against the defendants for refusing to honor a cheque of the plaintiffs when they had funds in their hands, *Park, J.*, says, "This action being substantially founded on a contract, I think it can make no difference whether it is in form *tort* or assumpsit. It is admitted that when there is a breach of an express contract, nominal damages may be recovered. The only difference between an express and implied contract, is as to the mode of proof. An express contract is proved by direct evidence—an implied contract by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the legal consequences resulting from the breach of it must be

to have been made without the disclosure by the defendant of his principal; no delivery, however, or part payment, took place till some time after the making of the contract before which time the defendant informed the plaintiff that he was acting as an agent for a third party.

A verdict was rendered for the plaintiff for \$129 80c. The defendant contended at the trial that he was not liable, as he purchased the peas for one German, as his agent. The judge told the jury that the defendant was personally liable if he made the agreement for the purchase of the peas in his own name without telling the plaintiff at the time of the making it, that he was purchasing as an agent and not as a principal; that if the defendant entered into the agreement in his own name for the purchase of the peas, making himself personally responsible to the plaintiff at the time, he could not afterwards, and before the delivery or part payment, divest himself from that responsibility by shewing that he was acting as an agent for German, or by disclosing his name.

Exception was taken to the judge's charge on the ground that he should have told the jury that the defendant was not personally liable if his principal was disclosed or known and credit given to him.

In April Term, 1861, after the sittings, a rule *nisi* was obtained to set the verdict aside on the ground of misdirection, when the learned judge delivered the following judgment:

In *Story's* able and intelligent work on agency, (a work which is received in the English Courts as well as the American Courts, as authority) at page 269, I find it laid down as law that "A person contracting as agent will be personally responsible, where at the time of making the contract he does not disclose the fact of his agency, but he treats with the other party as being himself the principal; for in such a case it follows irresistably that credit is given to him on account of the contract. Thus a factor or broker, or other agent, buying goods in his own name for his principal, will be responsible to the seller thereof in every case where his agency is not disclosed. But we are not therefore to infer that the principal may not also, when he is afterwards dis-

covered, be liable for the price of the same goods; for in many cases of the sort the principal and agent may both be severally liable upon the same contract." In *Chitty*, on Contracts, at page 226, it is said: "Upon the principle that the contract of an agent is the contract of the principal, an agent is not liable upon an agreement which he makes in his representative character, provided he do not personally contract or expressly pledge his own credit by concealing his principal or otherwise." In *Paley* on Agency, 372, it is stated, that in all cases where a factor delivers goods as his own, and conceals his principal, he is to be taken to all intents as the principal. This notification of the principal must be at the time of the contract. It is not sufficient to discharge the agent to make it afterwards. Lord *Ellenborough* C. J., was of opinion, in *Morgan v. Corden*, that a defendant was liable, the principal not having been disclosed at the time of the contract, and no subsequent act being done to shew that the plaintiff waived the liability of the defendant. In *Broom's Commentaries*, page 545, I find it laid down as law, that "Where an agent contracts for the purchase of goods as principal, he, by so doing, incurs a personal liability," and at page 547, if an agent makes an oral contract in his own name, the principal may sue as such or be sued upon it, for it is a general rule that whenever an express contract is made an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom in point of law it was made. In the case of *Jones v. Littledale*, 1 N. & P. 677, Lord *Denman*, in delivering the judgment of the court, lays down this as a general proposition of law, "That if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of contract, relieve himself from responsibility." I would also refer to the case of *Higgins v. Senior*, 8 M. & W. 834; *Green v. Kopke*, 18 C. B. 549; *Reid v. McChesney*, 8 U. C. C. P. R. 50. The case of *Magee v. Atkinson*, 2 M. & W. 440, is almost in point. In principle it differs in nothing from the present case. The present defendant made a contract in his own name

with the plaintiff, for the purchase of peas as principal, and when asked if he were purchasing for German he answered No.; that he wanted 300 bushels of peas for his own pigs and horses. The defendant became personally responsible to the plaintiff at the time he entered into the contract with him in his own name, and he cannot, according to the authorities I have cited, be allowed to relieve himself from that responsibility by subsequently shewing that he was acting as an agent.

By looking at the case of *Higgins v. Senior*, it will be seen that the point taken by the defendant upon the Statute of Frauds is not tenable. The delivery of the peas, which was made in pursuance of the verbal contract, refers back unto the time of the contract, and makes it binding on the defendant. There is no exception taken to the verdict upon the law and evidence, indeed none could be, and as the authorities establish, I think, satisfactorily, that there was no misdirection of the law at the trial, the present rule must be discharged.

From this judgment of the county court the defendant appealed to the court of Common Pleas, and contended that the rule should have been made absolute for a new trial, on the grounds that it appears by the evidence that the original contract was verbal and was not binding, being a contract for the sale of goods for the price of £10 sterling, and upwards, and no part of the goods having at the time of the contract been accepted or received, or any thing given in part payment, or to bind the bargain, and that before the goods, or any part thereof, were delivered, or any payment made, the defendant disclosed to the plaintiff (as the fact was) that the defendant was acting as agent of German, and refused to be personally responsible, and any amount that was paid was paid and received as German's money and payment, and that the delivery that was made must be held to be a delivery to or for German; that there was no delivery to, or acceptance by, the defendant of the goods as a purchase for himself, or with any intention of making himself personally liable; that under the circumstances set forth in the evidence it was a misdirection on the part of the

learned judge of the county court to refuse to tell the jury that the defendant was not personally liable if his principal was disclosed or known to the plaintiff, and credit given to him, the principal, before the acceptance or receipt of any part of the peas or part payment thereof.

S. Richards, Q. C., for the appellant, cited *Taylor v. Wakefield*, 6 E. & B. 765.

Harrison for respondent, cited *Bailey on Prin. and Agent* 369; *Leroux v. Brown*, 12 C. B. 801; *Waters v. Towers*, 8 Ex. 401; *Taylor v. Ashton*, 12 L. J. N. S. Ex. 363; *Black v. Jones*, 6 Ex. 213; *Horlor v. Carpenter*, 27 L. J. C. P. 1; *Clarke v. Arden*, 16 C. B. 227.

DRAPER, C. J.—The contract being verbal only, was not binding until the purchaser should accept part of the goods sold, or give something by way of earnest to bind the bargain, or make a partial payment on account thereof.

It must necessarily be held immaterial whether a party who makes a bargain void in itself by the Statute of Frauds, either does so in his own behalf, or on behalf of another. No action could be brought against either the actual bargainer, nor against any person whom he names as his principal in the transaction.

Subsequent events, such as are stated to have taken place in this case, viz., a delivery and acceptance of part of the goods, and a partial payment of the price, make a good contract, though there was nothing in writing.

Till some such subsequent event does happen, there is no contract. On this happening there is one, and then the other party who is contracting for a principal must disclose the fact, or he may be held liable himself to fulfil it.

The terms used in the charge of the learned judge, are not open to exception; "That if the defendant entered into the agreement in his own name for the purchase of the peas, making himself personally responsible at the time, he could not afterwards divest himself from that responsibility by shewing that he was acting as an agent for German, or by disclosing his name."

And if with this direction the jury had been told that by the words "entered into the agreement," they were to understand not the first verbal bargain alone, but the contract evidenced by that verbal bargain, with the subsequent part delivery and part payment, or both, if they were concurrent, and that a disclosure of the principal at the time a binding agreement was thus made and entered into would prevent any liability attaching upon the defendant, I should have been fully prepared to support the direction.

But from the form of the objection taken at the trial by the defendant's counsel, and from a part of the learned judge's judgment in discharging the rule *nisi*, I gather that he ruled, that although the bargain as at first made was void by the Statute of Frauds, yet it was so far effective as to prevent the defendant from discharging himself by naming his principal, when the part delivery or part payment took place.

The objection taken at the trial, and renewed in the rule *nisi*, was that the judge should have told the jury that the defendant was not personally liable, as his principal was disclosed or made known to the plaintiff, and credit given to him, before the acceptance or receipt of any part of the peas or part payment of the price.

And in the judgment the learned judge observed, "By looking at the case of *Higgins v. Senior* it will be seen that the point taken by the defendant upon the Statute of Frauds is not tenable."

The passage in the judgment in *Higgins v. Senior*, 8 M. & W. 834, alluded to is, I presume, the following:

"There is no doubt that when such an agreement is made it is competent to shew that one or both of the contracting parties were agents for other parties, and acted as such so as to give the benefit of the contract on the one hand to and charge with liability on the other, the unnamed principal, and this whether the agreement be, or be not required to be in writing by the Statute of Frauds."

I understand this passage in each case put, *i. e.*, whether required or not to be in writing, to refer to a valid and binding agreement; that whether it be one which is binding

without writing, or one which under the statute must, in order to be binding, be in writing, makes no difference in the application of the rule just enunciated; that it is competent to shew that one or both of the contracting parties, &c., &c.

If that be the true meaning of the passage it does not sustain the conclusion of the learned judge, which I take to be that if a contract not binding in its inception be made between two parties, which is by some subsequent act made valid and binding, neither of the parties can shew that they were mere agents for others, unless the statement were made at the inception, and not at the time of doing of the act or acts, without which there would be no contract in law.

The truth is, that until the act is done there is no contract, and the declaration of either party, which accompany the act of delivery, or of acceptance, or of payment or receipt, cannot be excluded, but must be treated as forming part of the complete and binding agreement.

I think, therefore, there should be a new trial, and assuming the evidence to be the same, the jury should be asked to say, whether the first bargain being verbal only, the defendant at the time of a part delivery of the peas to, and acceptance thereof by, him, or of the payment of the \$25, which ever first happened, stated that he was only an agent, disclosing his principal, accepted for him or paid for him, and with that knowledge the plaintiff went on with the transaction on his part. If they find this to have been so, they should be directed to give a verdict for the defendant. •

Per cur.—Appeal allowed.

MOORE ET AL. V. MURPHY.

MOORE ET AL. V. HUDSON.

AND

MOORE ET AL. V. CHAMBERS.

Railway company—Stockholder—Liability of to creditor of company for unpaid calls and interest—Necessity of all capital being subscribed before becoming so—Stat. 16 Vic., ch. 102—Con. Stat. Can., ch. 66.

Declaration alleged that the H. & P. D. Railway Company were indebted to the plaintiffs in £12,500, for which a judgment had been recovered and an execution returned "*nulla bona*;" that the defendant was a stockholder in that company and was liable to pay certain calls made by the company which he had not paid, and that the said calls with interest, amounting to £297 10s., were due by him to the company by means whereof the plaintiff, (under 16 Vic., ch. 102,) was entitled to demand and recover the said sum of money so due and in arrear from him for and in respect of the stock.

Plea on equitable grounds, that by the statute 16 Vic., the company was incorporated for certain purposes, and it was enacted that the capital stock should be £500,000 in 20,000 shares of £25 each; that the defendant subscribed for stock on the understanding that the whole capital stock was to be subscribed; that the directors in the name of the company contracted with the plaintiffs, and one C. P., for the performance of certain work before the said capital stock was subscribed or a sufficient portion to afford a reasonable prospect that the company would be enabled to complete the railway; that defendant never agreed that the railway or any portion thereof should be constructed or any contract entered into by the company or directors without the whole capital stock was subscribed, and so defendant never was a shareholder.

On demurrer, *held*, that by the statute 16 Vic., ch. 101, and the Railway Act (Stat. of Canada, ch. 66) it was not intended to make the subscription of the whole number of shares a condition precedent, to the exercise of the powers conferred by the act, and that the defendant, by subscribing and paying his deposit, rendered himself liable to all the provisions thereof.

The declaration stated that the Hamilton and Port Dover Railway Company were indebted to the plaintiffs in £12,500, for which debt the plaintiffs impleaded the railway company, and on the 2nd of July, 1860, recovered the same debt against the company with £7 12s. for costs, and on that judgment the plaintiffs issued execution, which was returned *nulla bona*, and the money so recovered by the judgment remain unsatisfied. That the said railway company were incorporated by the 16 Vic., ch. 102, and certain clauses of the Railway Clauses Consolidation Act therein referred to. That after the passing of that act, *i. e.*, on, &c., the defendant and others respectively subscribed for and became holders of shares of the capital stock of the railway com-

pany on the terms of becoming liable to pay five per cent. at the time of subscribing, and the residue as it should be called in by the directors in conformity with the said acts, and defendant on these terms became the holder of ten shares of £25 each of the capital, and ever since hath been and still is the holder thereof, and defendant at the time of subscribing paid five per cent. on each share. The declaration then set forth divers calls made by the directors of the railway company, amounting to the unpaid balance of the shares, averring due notice of each separate call, and that defendant paid none of them, nor any part thereof, and that the same remain wholly unpaid, by means whereof and by force of the said statutes, defendant became liable to pay interest at the rate of six per cent. per annum, amounting, together with the unpaid balance of the shares, to £297 10s., the whole of which is still in arrear and unpaid and is owing by defendant in respect of the said ten shares, "by means of which said several premises an action hath accrued to the plaintiffs to demand and have off and from the defendant a sum equal to the amount so owing and in arrear from him for and in respect of the said ten shares of the said capital stock so held by him."

Plea on equitable grounds, that by the said statute 16 Vic., the said company was incorporated for the purpose of constructing a railway to connect the waters of Burlington Bay, at the city of Hamilton, with the waters of Lake Erie at or near Port Dover; that it was enacted that the capital stock should be £500,000 in 20,000 shares of £25 each, to be raised by such persons or corporations as might become subscribers. That the directors in the name of the company contracted with the plaintiffs and one C. P. for the performance by them of a portion of the work on a part of the railway from its intersection with the Great Western Railway to Port Dover for the sum of £304,000, and directed the plaintiffs and C. P. to proceed with the performance of their contract without having obtained subscriptions for the whole of their capital, or for enough thereof to afford a reasonable expectation that they would obtain subscriptions for the whole, or enough to afford a reasonable prospect that

the company would be able to complete the railway, only £101,250 thereof then being subscribed. That after the commencement of the work the contract was abandoned and a new contract was entered into between the company and the plaintiffs, whereby plaintiffs, for the sum of £105,250, engaged to construct only a small portion of the railway from its intersection with the Great Western Railway at Hamilton to the village of Caledonia, to connect the city of Hamilton with the Buffalo and Lake Huron Railway, and the sum which the plaintiffs were to receive therefor exceeded the amount which could reasonably have been expected as applicable to that purpose from the stock subscription of the railway after paying for the other expenses necessary to complete such portion of the railway; that at the time of making the new contract the stock subscribed only amounted to £176,250, which included many "uncollectable" subscriptions, and the sum so subscribed has proved insufficient to pay for the portion of the work to be performed by the plaintiffs between Hamilton and Caledonia, a distance of sixteen miles, while the distance from Burlington Bay to Port Dover is 40 miles. That at the dates of the contracts the company had no means nor any reasonable hope of obtaining the means of completing the whole line to Port Dover, of which premises plaintiffs had notice when they entered into the contracts. That no part of the road has been completely constructed, nor has any part between Caledonia and Port Dover been begun, nor has any more stock been subscribed, and the said judgment was recovered in respect of the last mentioned contract. That defendant never agreed to the railway or any portion thereof being constructed or any contract being entered into by the company or the directors without the whole capital was subscribed, and defendant never waived the implied condition on which he subscribed for the ten shares, viz., that he was only to be liable to pay the same provided the whole of the capital stock was subscribed for, and so defendant says he never was a shareholder.

To which the plaintiffs demurred.

O'Reilly, Q. C., for plaintiff, cited *Moore v. Kirkland*, 5

U. C. C. P. 452; Tyre v. Wilkes, 13 U. C. Q. B. 482; Trustees, &c., Leek Turupike Roads v. The North Staffordshire Railway Company, 5 H. & N. 161; Henderson v. The Royal British Bank, 7 E. & B. 356; Daniel v. The Royal British Bank, H & N. 681.

Freeman, Q. C., and *Eccles*, Q. C., contra, *Lindley on Partnership* 27, and cases there cited.

DRAPER, C. J.—By the statute 16 Vic., ch. 102, sec. 1, certain named persons, together with such other persons, corporations and municipalities “as shall, under the provisions of this act, become shareholders,” are created a body corporate under the name of the Hamilton and Port Dover Railway company.

Sec. 2 incorporates certain clauses of the Railway Act, 14 & 15 Vic., ch. 51, with this act.

Sec. 3 authorises the company to construct a railway on and over *any part of the country lying between Port Dover and the city of Hamilton*.

Sec. 5 declares that the capital shall be £500,000, divided into 20,000 shares of £25 each, which amount shall be raised “by the persons named, or some of them, together with such other persons or corporations as may become subscribers, and the money so raised shall be applied in the first place towards the payment and discharge of all fees, &c., for procuring the passing of the act, and for making the surveys, plans and estimates of the said road and connected with the said railway.

Sec. 6.—Within one month after the passing of the act a general meeting of the shareholders is to be held for the purpose of *putting this act into effect*, at which meeting the shareholders present having paid five per cent. on their stock subscribed shall choose nine directors.

Sec. 9.—The persons qualified to be elected directors shall be any shareholder holding stock to the amount of £1,000 who shall have paid up all calls.

Sec. 12 enables the company to become parties to bills or notes for sums not exceeding £25. There is nothing in this section to prevent the making and endorsing of notes, or

drawing, accepting or endorsing bills so soon as the company is organised by the election of directors and appointment of officers.

Of the clauses of the Railway Act, Consol. Stat. Can., ch. 66, incorporated with the act 16 Vic., it seems only necessary to note the following :

Sec. 7, No. 19.—The word “shareholder” shall mean every subscriber to, or holder of, stock in the undertaking, and shall extend to, and include the personal representatives of the shareholder.

Sec. 48.—The directors may make calls. No call to be at an interval less than two months from the previous call.

Sec. 49.—Notice of calls to be published.

Sec. 50.—Every shareholder liable to pay the amount of the call so made.

Sec. 51.—Interest accrues on the amount of calls not duly paid.

Sec. 80.—Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock unpaid by him for the debts and liabilities thereof, and until the whole amount of his stock has been paid up, but shall not be liable to an action therefor before an execution against the company has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholder.

Sec. 9, No. 11.—Power to borrow such sums as may be necessary for completing, maintaining and working the railway, and to make the bonds, debentures or other securities granted for the sums borrowed payable in currency or sterling, at any place, and to sell the same at a discount and to pledge the company's lands, tolls, revenue and property for the due payment of the sums and interest.

Sec. 59.—Directors may sell either by public auction or private sale, and in such manner and on such terms as to them seem meet any share so declared to be forfeited, and also any shares remaining unsubscribed for in the capital stock of the company, or pledge such forfeited or unsubscribed shares for the payment of loans or advances made

or to be made thereon, or of any sums of money borrowed or advanced by or to the company.

The plea does not rest the defence on the ground that the directors of the company have abandoned the intention of completing the whole line of the road which the act provides for, and only intend to construct some small portion thereof. The statements of the contracts made with the plaintiffs, and the insufficiency of the stock subscribed to pay for the work contracted for seem, if not wholly redundant, introduced in order to shew that the plaintiffs had knowledge of them, and so to establish against them what the defendant might have endeavored to set up against the company had they sued him for calls, namely, that he had subscribed for shares on the implied condition that the whole capital stock should be subscribed before he could be made liable as a shareholder, and that as this had not happened he never became a shareholder, with which averment the plea concludes.

The special act, 16 Vic., ch. 102, erected the individuals therein named into a corporation at once, and not upon the happening of any contingency whatever.

When the defendant subscribed for shares and paid the necessary deposit thereon, he did all that the statute required to make him a shareholder in the corporation thus erected, and unless we can properly infer from the statutes themselves that the legislature did not intend that the directors of the company should begin to carry on its business until all its stock was subscribed, the defence fails.

The word shareholder is defined to mean a subscriber to, or holder of, stock in the undertaking. The directors are empowered to make calls of money upon the "shareholders." Every shareholder is declared to be liable to pay the amount of regularly made calls. On default of payment a shareholder may be sued, and every shareholder is made individually liable to actions like the present.

Unless the defendant could successfully resist an action by the company for calls, I do not perceive any ground on which he can resist this action in which the declaration not only shews the amount remaining unpaid on the stock subscribed by him, but avers that regular calls have been made

for that amount, so that interest has become due since default was made in the payment of each call. The clause declaring the liability of every shareholder is unqualified, as much so as was the covenant to pay in *The London and Continental Insurance Company v. Redgrave*, 4 C. B. N. S. 524. In *Watts v. Salter*, 10 Com. B. 477, in which a somewhat similar question arose, *Parke*, B. said, "It has been contended that the directors had no power under the deed" (which the defendant in that case had executed,) "to deal with any part of the money until the whole amount had been subscribed. I do not, however agree in that construction. If such had been the plaintiff's intention he should have taken care not to execute a deed which did not express it. No such express stipulation is to be found on the face of the deed, and none can be implied."

In this case we cannot look out of the pleadings and the statutes, and they disclose no preliminary understanding on which the implied condition contended for by the defendant can be grafted. It cannot, I think, make any difference whether he subscribed before or after the first election of directors; In either case he knew their power to make and to enforce calls, and that there was no *expressed* condition to restrain them. I see no substantial distinction between this and an absolute covenant to pay contained in a deed, which was the only evidence of the transactions between the parties thereto. In that case the deed, in the present case the statutes, are all that can be looked at to ascertain the extent or qualification of the undertaking.

But it has been argued that as the fifth section of the special act declares that the capital stock of the company shall be £500,000, the procuring that sum to be subscribed is a condition precedent to the exercise of the power conferred. There may be, as is pointed out in some of the cases, a distinction between third parties whose property or rights are liable to be affected by the exercise of such powers, and subscribers to the stock. Any such distinction would not strengthen the defendant's case, for he belongs to the latter class, and the concluding part of the fifth section

might possibly be as well construed to impose a duty on the parties named in the act, and all subsequent subscribers, to raise the amount of £500,000, as the former can to create a condition precedent. The direction that the "*amount shall be raised*" is as mandatory in its form as the direction that the capital stock "*shall be*" £500,000. And if a duty to raise the stock has been undertaken by the defendant, he can hardly set up the former words as raising an implied condition in his favour.

But there are other provisions bearing on the question. The concluding part of this fifth section contemplates the payment out of the capital stock of some expenses which must have been incurred before the act was passed, and of others which might have been, particularly the expense of procuring estimates, which would naturally effect the determination of the necessary amount of the capital stock. If the defendant never became a shareholder, he (and all others in the like situation) would have a right to withdraw the five per cent. paid under the sixth section of the special act, although he (and they) were subscribers, and the appropriation of moneys so raised would be made nugatory. Then again, the first general meeting for the purpose "putting the act into effect" is to take place within one month after the act is passed, and nine directors are to be chosen. And immediately after the election of directors and appointment of officers, there is nothing expressed to prevent their acting under the 12th section, and becoming parties to bills of exchange and promissory notes.

Then, among the clauses of the general railway act, incorporated with the special act, are the powers to make calls, to sue for and recover them with interest, to enter upon, set out and acquire lands, to borrow money and pledge the company's estate, and to pledge and dispose of unsubscribed shares. Even in respect to the acquisition of lands there is no such expressed restriction as in the Lands Clauses Consolidation Act in England, (8 Vic., ch. 18, sec. 16,) making the subscription of the whole capital a condition precedent to the exercise of these powers. If any of the powers affecting third parties can be exercised before the whole capital stock

is subscribed, it would seem to follow *a fortiori* that the obligations provided with respect to subscribers must attach also.

I have arrived at the conclusion that the legislature did not intend to make the subscription of the whole number of shares a condition precedent to "putting the act into effect," a phrase I consider as equivalent to "exercising the powers conferred by the act." I think that the condition contended for by the defendant could not be properly implied from the fifth section, and that it would be at variance with the other enactments and provisions. I do not mean that the act puts the proceedings of the corporation or its directors beyond restraint or control, but that it is not fettered by this assumed condition.

In my opinion the defendant, by subscribing and paying his deposit, rendered himself liable to the provisions as well respecting calls as to those under which this action is brought and therefore that the plaintiff is entitled to judgment.

See *Moore v. Kirkland*, 5 C. P. U. C. 452; *The Barber Surgeons v. Pelson*, 2 Lev. 252; *Feltmakers' Company v. Davis*, 1 B. & P. 98; *Tobacco Pipe Makers' Company v. Woodroffe*, 7 B. & C. 838; *Tobacco Pipe Makers' Company v. Loder*, 15 Jur. 1194; *Pitchford v. Davis*, 5 M. & W. 2; *Dickinson v. Valpy*, 10 B. & C. 125; *Galvanized Iron Company v. Westoby*, 8 Exch. 17; *Fox v. Clifton* 6 Bing. 776, and 9 Bing. 115; *London and Continental Assurance Company v. Redgrave*, 4 C. B. N. S. 524; *Watts v. Salter*, 10 C. B. 477; *Henderson v. Royal British Bank*, 7 E. & B. 356; *Powis v. Harding*, 1 C. B. N. S. 533, and *Daniel v. Royal British Bank*, 1 H. & N. 681; *Bourne v. Freeth*, 9 B. & C. 632; *Vice v. Lady Anson*, 7 B. & C. 409; *Waterford, &c. Railway Company v. Dalbiac*, 6 Exch. 443; *Cohen v. Wilkinson*, 12 Beav. 125, 137, 13 Jur. 641; *Hodgson v. Powis*, 12 Beav. 392; 14 Jur. 906; *Simpson v. Dennison*, 10 Hare 51; *Ransford v. Bosanquet*, 2 Q. B. 972; *Cross v. Law*, 6 M. & W. 217; *Harvey v. Scott*, 11 Q. B. 92; *In re. Emery*, 10 C. B. 160; *In re. Emery*, 15 Jur. 336.

MOORE ET AL. V. HUDSON.

The judgment just given applies to this case. There is also this difference in this case—that the declaration contains an averment that the defendant paid five per cent. at the time of subscribing.

MOORE ET AL. V. CHAMBERS.

There is in this case a plea of never indebted, to which the plaintiff has demurred.

I think this is an action of debt given by statute, and that the plea is good. It was pleaded in an action of a similar character, brought in this court, and was treated by *McCauley*, C. J., as imposing on the plaintiff the burthen of proving every material allegation in the declaration, (*Moore v. Kirkland*, 5 C. P. U. C. 452.) There is abundance of English authority to the same effect. The defendant is entitled to judgment on this demurrer.

The second plea is similar to that pleaded in *Moore v. Murphy*, and for the reasons given in that case I think the plaintiff entitled to judgment on the demurrer.

HAGARTY, J.—I concur in thinking the equitable plea fails. The statute, instead of impliedly making the subscription of the whole capital a condition precedent to the right of the company to commence operations and make calls, appears to me to contemplate the case of a portion of the shares not being subscribed for. The special act incorporates many provisions from the Railway Clauses Consol. Act 14 & 15 Vic., ch. 51. Amongst other provisions so adopted is sub-sec. 17 of sec. 16, which reads thus, “The directors of said company may sell either by public auction or private sale, and in such manner and on such terms as to them shall seem meet, any share so declared to be forfeited, *and also any shares remaining unsubscribed for in the capital stock* of the company, or pledge such forfeited or unsubscribed shares for the

payment of loans or advances made or to be made thereon, or of any sum of money borrowed or advanced by or to the company."

I cannot place the defendants in a better position than to consider them as urging this plea in answer to an action for calls. To be a good answer, it ought to contain such matters as if stated in a bill filed to restrain such action would entitle them to enjoin the company from preceeding with the suit.

My strong impression is that the state of facts urged by defendants would not so entitle them. I may concede (for the argument) that they may have had the equity to have originally restrained the company from entering into the contract for making this portion of the road when not in a position to complete it, or without reasonable hope of completing it. *Cohen v. Wilkinson* (12 Bea. 125) in the Rolls, confirmed afterwards in appeal by Lord *Cottenham*, may support the right to forbid their undertaking a part of the road except with a view to the making it a continuous part of the whole undertaking.

But interfering to prevent an improper prosecution of the work or a contract for such purpose is widely different from resisting payment of subscribed stock long after such contract has been made and the work under it executed. It appears to me that no active consent is required in such a case to conclude a shareholder. The omission to apply promptly to a court of equity after a long lapse of time and after heavy expenditure notoriously incurred, would in my mind be fatal to such a late application.

Graham v. Birkenhead and Lancashire Railway Company, 2 M. & Gordon, 156, was an appeal from the Rolls (12 Bea. 460) by the plaintiff, a shareholder, to restrain the company from making a proposed line only seventeen miles out of the original forty-six miles, &c., &c. Lord *Cottenham* says, "I do not mean to go into a detail of dates, but it is clear, that long ago every shareholder who took the trouble to inform himself of the state of the property in which he had embarked must have been aware that the whole scheme could not be carried out. This was distinctly known in

November, 1848. "The moment it was known that the whole scheme could not be carried out the question arose whether the party who subscribed his money did or did not acquiesce in its being applied to carry out the work as far as the money would go. A considerable period of time has elapsed since that knowledge came to every one of the parties represented by the plaintiff, and for this purpose it is immaterial whether they have paid their calls or not. Well then, from November, 1848, down to the time when the bill was filed (May, 1850) the company, knowing they could not complete the whole work, proceeded to carry it on to a certain extent, continue a contract which is of an earlier date than that with the party who contracted to do the work, lay out large sums of money for keeping the contractor at work, and of course come under liabilities to him. Was it not the duty of those who meant to dispute that, to make an application at once to a court of equity to prevent it? It seems to me that the moment that fact came to the knowledge of any individual member of the company he (knowing that the company in the existing state of their finances intended to go on with the work as far only as they could) ought to have made an application to stop them. And the question is whether, by not doing so, he has not given rise to a new equity against himself which deprives him of the right to prevent the company from doing that which was contrary to the right which the shareholders had. I have not been able to discover any answer to that. Assuming that the parties knew, as they must have known, what the course of proceeding was, I consider that they have precluded themselves from coming to a court of equity to ask for the exercise of its extraordinary jurisdiction, by the course which they have pursued in not coming earlier. It was the duty of the plaintiff, as soon as there was this manifestation of intention on the part of the company to carry out a work which must of necessity be of less extent than they had originally anticipated, to have enquired how the matter stood, and if they wanted the interposition of a court of equity, to have applied at once, and to have seen what the court of equity would say in that state of things."

Now all this sound reasoning seems directly applicable to the state of facts disclosed on the pleadings before us.

This suit was commenced last February. Plaintiffs recovered judgment in the preceding July. The pleadings shew four calls were made and regularly published in September, 1856, payable at intervals. Again, October, 1858, five other calls were made and regularly published. That defendants never paid either the five per cent. payable on their original subscriptions, nor any of the calls. The plea confessing all this, tries to avoid it by shewing that the directors gave a contract for part of the work to plaintiffs for £304,000, on which some work was done, and that this was entered into without a sufficient amount being subscribed, or any reasonable expectation of having enough subscribed. That this contract was rescinded and a second contract made with plaintiffs for executing a portion of the road from Hamilton to Caledonia for £105,250 without enough subscribed or reasonable expectation as before. And that plaintiffs' judgment was for work under this last contract, and that defendants never consented or agreed to the work being constructed or contract made till all the capital stock was subscribed, nor ever waived the implied condition on which he subscribed, viz., that he was not to be liable until the whole capital was subscribed.

I entertain a very strong opinion that on the state of facts admitted on these pleadings, the defendants cannot now be allowed to ask the extraordinary intervention of a court of equity to relieve them from liability to pay up their stock. They do not assert that the events, narrated on the record, took place without their knowledge. They merely deny that they acquiesced in them. I think that it would be contrary to all principles of equity, certainly contrary to the principle so clearly laid down by Lord *Cottenham*, to allow such a defence to prevail after laches so marked and inexcusable. In the words cited they have thus "raised an equity against themselves," which must destroy their right to assistance.

The defendants treat this subscription as conditional on the whole capital being subscribed. The act allows directors

to be elected within a month from its passing, and that such election shall be made by all shareholders present who shall have paid five per cent. on their stock subscribed. I hardly think that the legislature intended to prevent any election of directors until the whole capital was subscribed, or to prevent, till that event happened, the creation of the machinery necessary for the new corporation exercising any of its powers, amongst which might reasonably be reckoned the adoption of proper means to bring the merits of the undertaking before the public, and induce a more extensive subscription. If this view be correct, it may be asked whether the subscribers, who elected the first directors and paid five per cent., subscribed conditionally or unconditionally, and if unconditionally what subsequent event made the subscription conditional, and if conditionally, was the subscription and payment merely to be for all preliminary expenses, and all expenses for surveys, plans, estimates, &c., &c. The true solution of these difficulties is probably this: that the subscription is absolute, and makes the subscriber a shareholder unconditionally. That he thereby becomes clothed with all necessary powers to invoke the aid of the courts of equity to restrain his representatives, the directors, from any improper exercise of their legal powers, or from acting in any way against the charter to his prejudice. This right is fully conceded to him, but he must exercise it in all cases with reasonable promptitude. His want of diligence in this allows new interests to be created and liabilities to be incurred, and he thereby creates an equity against himself which destroys his claim to relief.

Per cur.—Judgment for plaintiffs.

payment of loans or advances made or to be made thereon, or of any sum of money borrowed or advanced by or to the company."

I cannot place the defendants in a better position than to consider them as urging this plea in answer to an action for calls. To be a good answer, it ought to contain such matters as if stated in a bill filed to restrain such action would entitle them to enjoin the company from proceeding with the suit.

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the company would be able to complete the railway, only £101,250 thereof then being subscribed. That after the commencement of the work the contract was abandoned and a new contract was entered into between the company and the plaintiffs, whereby plaintiffs, for the sum of £105,250, engaged to construct only a small portion of the railway from its intersection with the Great Western Railway at Hamilton to the village of Caledonia, to connect the city of Hamilton with the Buffalo and Lake Huron Railway, and the sum which the plaintiffs were to receive therefor exceeded the amount which could reasonably have been expected as applicable to that purpose from the stock subscription of the railway after paying for the other expenses necessary to complete such portion of the railway; that at the time of making the new contract the stock subscribed only amounted to £176,250, which included many "uncollectable" subscriptions, and the sum so subscribed has proved insufficient to pay for the portion of the work to be performed by the plaintiffs between Hamilton and Caledonia, a distance of sixteen miles, while the distance from Burlington Bay to Port Dover is 40 miles. That at the dates of the contracts the company had no means nor any reasonable hope of obtaining the means of completing the whole line to Port Dover, of which premises plaintiffs had notice when they entered into the contracts. That no part of the road has been completely constructed, nor has any part between Caledonia and Port Dover been begun, nor has any more stock been subscribed, and the said judgment was recovered in respect of the last mentioned contract. That defendant never agreed to the railway or any portion thereof being constructed or any contract being entered into by the company or the directors without the whole capital was subscribed, and defendant never waived the implied condition on which he subscribed for the ten shares, viz., that he was only to be liable to pay the same provided the whole of the capital stock was subscribed for, and so defendant says he never was a shareholder.

To which the plaintiffs demurred.

O'Reilly, Q. C., for plaintiff, cited *Moore v. Kirkland*, 5

U. C. C. P. 452; Tyre v. Wilkes, 13 U. C. Q. B. 482; Trustees, &c., Leek Turupike Roads v. The North Staffordshire Railway Company, 5 H. & N. 161; Henderson v. The Royal British Bank, 7 E. & B. 356; Daniel v. The Royal British Bank, H & N. 681.

Freeman, Q. C., and *Eccles*, Q. C., contra, *Lindley on Partnership* 27, and cases there cited.

DRAPER, C. J.—By the statute 16 Vic., ch. 102, sec. 1, certain named persons, together with such other persons, corporations and municipalities “as shall, under the provisions of this act, become shareholders,” are created a body corporate under the name of the Hamilton and Port Dover Railway company.

Sec. 2 incorporates certain clauses of the Railway Act, 14 & 15 Vic., ch. 51, with this act.

Sec. 3 authorises the company to construct a railway on and over *any part of the country lying between Port Dover and the city of Hamilton*.

Sec. 5 declares that the capital shall be £500,000, divided into 20,000 shares of £25 each, which amount shall be raised “by the persons named, or some of them, together with such other persons or corporations as may become subscribers, and the money so raised shall be applied in the first place towards the payment and discharge of all fees, &c., for procuring the passing of the act, and for making the surveys, plans and estimates of the said road and connected with the said railway.

Sec. 6.—Within one month after the passing of the act a general meeting of the shareholders is to be held for the purpose of *putting this act into effect*, at which meeting the shareholders present having paid five per cent. on their stock subscribed shall choose nine directors.

Sec. 9.—The persons qualified to be elected directors shall be any shareholder holding stock to the amount of £1,000 who shall have paid up all calls.

Sec. 12 enables the company to become parties to bills or notes for sums not exceeding £25. There is nothing in this section to prevent the making and endorsing of notes, or

drawing, accepting or endorsing bills so soon as the company is organised by the election of directors and appointment of officers.

Of the clauses of the Railway Act, Consol. Stat. Can., ch. 66, incorporated with the act 16 Vic., it seems only necessary to note the following :

Sec. 7, No. 19.—The word “shareholder” shall mean every subscriber to, or holder of, stock in the undertaking, and shall extend to, and include the personal representatives of the shareholder.

Sec. 48.—The directors may make calls. No call to be at an interval less than two months from the previous call.

Sec. 49.—Notice of calls to be published.

Sec. 50.—Every shareholder liable to pay the amount of the call so made.

Sec. 51.—Interest accrues on the amount of calls not duly paid.

Sec. 80.—Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock unpaid by him for the debts and liabilities thereof, and until the whole amount of his stock has been paid up, but shall not be liable to an action therefor before an execution against the company has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholder.

Sec. 9, No. 11.—Power to borrow such sums as may be necessary for completing, maintaining and working the railway, and to make the bonds, debentures or other securities granted for the sums borrowed payable in currency or sterling, at any place, and to sell the same at a discount and to pledge the company's lands, tolls, revenue and property for the due payment of the sums and interest.

Sec. 59.—Directors may sell either by public auction or private sale, and in such manner and on such terms as to them seem meet any share so declared to be forfeited, and also any shares remaining unsubscribed for in the capital stock of the company, or pledge such forfeited or unsubscribed shares for the payment of loans or advances made

or to be made thereon, or of any sums of money borrowed or advanced by or to the company.

The plea does not rest the defence on the ground that the directors of the company have abandoned the intention of completing the whole line of the road which the act provides for, and only intend to construct some small portion thereof. The statements of the contracts made with the plaintiffs, and the insufficiency of the stock subscribed to pay for the work contracted for seem, if not wholly redundant, introduced in order to shew that the plaintiffs had knowledge of them, and so to establish against them what the defendant might have endeavored to set up against the company had they sued him for calls, namely, that he had subscribed for shares on the implied condition that the whole capital stock should be subscribed before he could be made liable as a shareholder, and that as this had not happened he never became a shareholder, with which averment the plea concludes.

The special act, 16 Vic., ch. 102, erected the individuals therein named into a corporation at once, and not upon the happening of any contingency whatever.

When the defendant subscribed for shares and paid the necessary deposit thereon, he did all that the statute required to make him a shareholder in the corporation thus erected, and unless we can properly infer from the statutes themselves that the legislature did not intend that the directors of the company should begin to carry on its business until all its stock was subscribed, the defence fails.

The word shareholder is defined to mean a subscriber to, or holder of, stock in the undertaking. The directors are empowered to make calls of money upon the "shareholders." Every shareholder is declared to be liable to pay the amount of regularly made calls. On default of payment a shareholder may be sued, and every shareholder is made individually liable to actions like the present.

Unless the defendant could successfully resist an action by the company for calls, I do not perceive any ground on which he can resist this action in which the declaration not only shows the amount remaining unpaid on the stock subscribed by him, but avers that regular calls have been made

between the parties by which the right is given up. The defendants resist this action on the ground that they have a right to retain goods made by them for the plaintiff until they are paid for the making. The plaintiff asserts an agreement, partly performed on his part and accepted by the defendants as a waiver of the lien. The defendants admit the facts, but set up in objection to their sustaining the conclusion of waiver, which the plaintiff deduces from those facts: 1st. That the replication sets up an accord without satisfaction. 2nd. That the premises in the replication could not in law be a satisfaction, though they had been agreed to and actually accepted as such. There was a third objection, as to which it is enough to say the days of special demurrers are departed.

The first two objections only present the same question in a different shape, and both confound the right of lien with a distinct thing, namely, accord and satisfaction. An innkeeper has a lien on the goods of his guests, but he has no right to detain such goods if he had previously agreed to give credit for the entertainment. The previous agreement prevents the lien ever attaching, though the debt incurred under it has neither been paid nor any accord and satisfaction of it; and such, I apprehend, would be the case if the goods still remained in the innkeeper's hands after the time of credit had expired, (see *Jones v. Thurloe*, 8 Mod. 172.) And so, if a special agreement be afterwards made for payment and a security taken for the debt, which is payable at a distant day, the lien, though it had attached is gone, (*Hewison v. Guthrie*, 2 Bing. N. C. 759, per Tindal, C. J.; *Cowell v. Simpson*, 16 Ves. 275.)

The present case shews a lien existing, a new agreement waiving a present right of payment, an acceptance of a security in part performance of that agreement, and a tender of performance of the residue of that agreement. This is, I think, a clear waiver of the lien, though no accord and satisfaction of the original debt.

I think therefore, the appellant is right, and that judgment should be given in the court below in his favor on the demurrer.

RICHARDS, J.—A good deal of discussion took place on the argument as to the time when the property passed to the buyer on a sale of chattels, it may be as well to refer to some of the authorities. In *Dixon v. Yates*, 5 B. & A. at page 340, *Parke J.* observes :

"I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. * * * Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract." In addition to this, however, where payment is to be made at once the vendor has a lien on the chattel for the unpaid purchase money.

In *Brown on the Common Law*, at page 408, it is stated : "When two parties intend an immediate sale of some specific chattel, and have definitely agreed upon its price, if the vendee thereupon tenders such price in payment, it is clear that the vendor will be bound, and that delivery of the chattel will not be necessary in order to pass the property therein to the vendee. *Dixon v. Yates* is referred to as authority for this proposition, as also *Noy. Max.* 88, and *Sheppard's Touchstone* 225, which latter are quoted as follows :

"If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer ; but if he presently tender me my money and I refuse it, he may take the horse or have an action of detinue." "Again, if I offer money for a thing in a market or fair, and the seller agrees to take my offer, and whilst I am telling the money as fast as I can he doth sell the thing to another, or when I have bought it we agree that he shall keep it until I can go home to my house to fetch the money, in both these cases, especially in the first, the bargains are good, so as the seller may not sell them afterwards to another, and upon the payment or tender and refu-

sal of the money agreed upon, I may take or recover the thing."

The present Mr. Justice *Blackburn* in his very able work on the contract of sale beginning at page 170; has a chapter under the following head :

"The effect of a bargain and sale is to transfer the property in the goods without any delivery; in this respect English law differs from the civil law." He then quotes at great length from Pothier, and reviews the English authorities, and fully sustains the doctrine just quoted as the heading of the chapter.

Taking the facts of this case as stated in the pleadings, it would appear that at the time the bargain was made, the articles were not in *esse* so that could not be said to be a sale of *specific* chattel, but the subsequent agreement set up in the replication, and which is averred to have been partly performed, seems to me, taken in connection with the fact that the defendants allege that they retained the articles replevied for their lien, to shew beyond all reasonable doubt that what took place was equivalent to a sale on the terms mentioned in the replication, or to waiving the lien on those terms. The acceptance of the cognovit in part performance of the agreement would seem to set at rest any question that might arise on the Statute of Frauds, and the lien was gone by the tender of the balance of twenty dollars as agreed upon.—*Martindale v. Smith*, 1 Q. B. 389.

The defendant's error has arisen from not sufficiently distinguishing between a plea of accord and satisfaction set up as an answer to a claim for a pre-existing debt acknowledged to be due, and a tender of what was agreed to be paid as the purchase of a chattel, the property in which had passed to the purchaser by the bargain, and the possession of which the seller could only rightfully retain until he received what was agreed to be paid for it; and readiness and willingness to deliver what was so agreed to be paid, and a refusal to accept on the part of the seller is sufficient, especially when accompanied by a tender to destroy the lien which the seller had for his unpaid purchase money.

I therefore think the defence fails, and that the appeal.

should be allowed, and that judgment should be given for the plaintiff on the demurrer to the replication.

Per cur.—Appeal allowed.

KIRCHHOFFER V. JAMES ROSS AND LETITIA, HIS WIFE, ET AL.

Bond — Administration — Liability of administratrix thereunder — Sui brought against her after marriage, on bond executed when sole—Joiner of husband — Allegations necessary in declaration — Married Woman's Act.

The plaintiff declared upon a bond dated the 4th of June, 1858, made by the defendant, Letitia Ross, and two others without her husband, when sole and unmarried, by the name of Letitia Macaulay, to His Excellency the Governor-General and his successors for £300, conditioned for the due administration of the estate of Andrew Macaulay, alleging the issue of letters of administration, that goods and chattels of Andrew Macaulay, amounting to £250, came into her hands to be administered, 1st July, 1858, that she wasted the same and disposed thereof to her own use; that the bond was assigned to the plaintiff as trustee for the next of kin, by order of the judge, who thereupon became entitled to sue thereon, &c. After assessment of damages on judgment by default,

Held, on motion by the defendants James and Letitia Ross in arrest of judgment, that the case came within the 18th sec. of the Married Woman's Act, and that her husband was properly joined, and that it was necessary to allege that the cause of action accrued before marriage, and that she had separate estate. The court were therefore of opinion that the judgment should be arrested, unless the plaintiff was allowed within one month, on motion for that purpose in chambers, to add the necessary suggestions to the declaration under the 217th sec. of the Common Law Procedure Act. Such amendment or addition not being allowed unless the plaintiff, on affidavit, shewed reasonable ground for believing that the final decision of the suggestion will be in his favour.

The declaration stated that on the 4th of June, 1858, the defendant Letitia then being sole and unmarried, by the name of Letitia Macaulay, and the defendants McCabe and Sharp, by their bond acknowledged themselves to be bound unto His Excellency the Governor-General, and to his successors in the sum of £300, with the condition that if the said Letitia, administratrix of Andrew Macaulay, then lately deceased should make a true inventory of all and singular the goods, &c., which before then had or thereafter should come to the said Letitia's hands, possession or knowledge, or into the hands, &c., of any person for her, (with the other usual conditions of an administration bond.) That afterwards letters of administration to the estate of the said Andrew Macaulay were granted to the said Letitia, and that goods and chattels and credits of the said Andrew Macaulay,

amounting to £250, came into the hands of the said Letitia for administration. •That the said Letitia wasted the same contrary to the said condition, and disposed of the same to her own use, and has not made a just and true account of her administration. That the judge of the Surrogate Court on application to him on petition pursuant to the statute ordered the registrar of the said court to assign the bond to the plaintiff, and the bond was accordingly assigned to him as trustee for the next of kin of the deceased Andrew Macaulay, who thereupon became entitled to sue upon the said bond in his own name as such trustee, and to demand and have the said £300. Yet defendants have not paid, &c.

The defendants suffered judgment by default, and damages were assessed at the assizes at Cobourg in March last, before *McLean*, J. It was proved that the administratrix had been cited before the judge of the Surrogate Court, and the accounts were investigated. Assets to the amount of \$589.50 were admitted to have been received, and the amount allowed to be deducted was \$147.95 for all charges, debts and funeral expenses. The balance, \$441.65, remained to be distributed, one-half to the defendant Letitia as widow, and the other half to the next of kin. This investigation was on the 15th of February, 1860, and the amount due, adding interest, was £59 6s. 8d., for which the jury gave a verdict.

In Easter Term, *D. B. Read* Q. C., on behalf of James and Letitia Ross, obtained a rule *nisi* to arrest the judgment because—1st. The plaintiff sues as trustee for the next of kin in pursuance of an order of the Judge of the Surrogate Court, and shews no decree or sentence of any court or judge ordering a distribution among such next of kin, and a court of law has no jurisdiction to entertain the plaintiff's suit. Because there is no averment that the defendant Letitia hath or has had any separate property. Because plaintiff claims the penalty of the bond from the defendant James Ross as well as from the other defendants. Because there is no allegation that the intestate's debts have not been paid by the defendants, or any of them. Because there is no assignment or suggestion of breaches on the roll;

or to set aside the verdict for the plaintiff as contrary to law and evidence, the damages being assessed against the defendant James Ross, together with the other defendants, and the plaintiff having no right to recover against his individual goods, and that the plaintiff has not enquired of the separate estate of the defendant Letitia, or by proper evidence proved the damages sustained, or that plaintiff gave no evidence of any sentence, order or decree of any court ordering a distribution of the estate of the intestate; or to reduce the assessment to nominal damages, or to restrain the plaintiff from entering up judgment against any property of James Ross.

In Trinity Term, *Hector Cameron* shewed cause, citing *Metcalf v. McKenzie*, 2 U. C. Q. B. 103.

DRAPER, C. J.—The breaches alleged in the declaration are admitted. They are—1st, that the administratrix did not well and truly administer, but on the contrary she wasted the goods, chattels and credits, which came to her hands, and converted and disposed thereof to her own use. 2nd, that she has not made a just and true account of her administration at or before the last Monday in June, 1859, or at any other time. There is no such breach as is charged in the *Archbishop of Canterbury v. Tappen*, 8 B. & C. 151, which was cited by Mr. Read, that the administratrix had not delivered and paid over to the next of kin the residue of the goods. But to maintain this action on the breaches assigned, there is no necessity to shew a decree or sentence ordering a distribution, nor to aver that the debts of the intestate have not been paid by any of the defendants. The plaintiff will not recover for his own benefit, whatever he recovers will be for the benefit of those who may be entitled as *cestui que trusts*, but we have nothing to do with them in this action.

There is greater difficulty in the plaintiff's way arising from the act concerning certain separate rights of property of married women.—Consolidated Statute U. C., ch. 73.

That act was under our consideration in *Muldoon v. Bilton*, 10 U. C. C. P. 382. We decided there that the

husband was properly joined as a defendant with his wife in an action grounded on a contract made by her before her marriage, and that it was made necessary by that act that the declaration should contain an averment that she had separate estate.

On this record it appears that the bond sued upon was made on the 4th of June, 1858, conditioned, among other things, that the administratrix should make a just and true account on or before the last Monday in June, 1859; that on the 1st of July, 1858, goods came to the hands of the defendant Letitia, then Letitia Macaulay, to be administered. It is not stated in express words whether she wasted the goods before or after her marriage with the defendant James Ross; but I apprehend it is meant that it was before, because, in assigning a further breach, the declaration avers that the said Letitia being then sole and unmarried, and at the time hereinafter next mentioned, did not make a true and just account, &c., at or before the last Monday in June, 1859, from which the apparent inference is, that she was not before that day married to the defendant James Ross. Her marriage to him must therefore have taken place after the 4th of May, 1859, and her rights and liabilities as a married woman as well as those of her husband on her account were regulated by the statute 22nd Vic. ch. 34, Consolidated Statute U. C., ch. 72. Section 1 enables her to hold all her real and personal property whether belonging to her before marriage or acquired in any way after marriage, free from her husband's debts or obligations, and from his control or disposition without his consent, in as ample a manner as if she were sole and unmarried, provided (sec. 3) this shall not protect her property from seizure and sale on any executions against her husband for her torts, and "in such case executions shall first be levied on her personal property." Sec. 14.—"Every married woman having separate property whether real or personal not settled by any ante-nuptial contract shall be liable upon any separate contract made, or debt incurred by her before marriage," (such marriage being since the passing of the act,) "to the extent and value of such separate property in the same manner as if she were sole

and unmarried." Sec. 15.—Every husband married since the passing of this act who "takes any interest in the separate real or personal property of his wife under any contract of settlement on marriage shall be liable on the contracts made, or debts incurred by her before marriage to the extent or value of such interest only, and no more." Sec. 18 (19 of the original act).—In an action against a married woman upon a contract made, or debt incurred by her before marriage, her husband, if residing in the province, is to be a party, and in the declaration "it shall be alleged that such cause of action accrued before marriage, and also that such married woman has separate estate," and the judgment against her shall be to recover of her separate estate only, unless in any action against her in which her husband has been joined as a party any false plea has been pleaded by him, when the judgment shall be in addition to recover against him the costs occasioned by such false plea as in ordinary cases.

From these provisions it would appear that if a woman while sole and unmarried makes a contract or incurs a debt, having no real or personal estate, and afterwards marries, no action can be maintained against her while covert, because it must be averred in the declaration that she has separate estate; nor will her husband be liable on the contracts made or debts incurred by her before marriage, except to the extent of any interest he has taken in her separate real or personal estate.

The present case falls within the 18th section if the wife had any separate estate, and if not, I do not at present perceive what remedy there is against her. According to the evidence it is probable she had at the time of her marriage some of the property of her deceased husband. Possibly she may still have some, or her now husband may have reduced it into possession, or made use of it so as to be liable within the 14th section in a joint action for the debt incurred by the wife. But however that may be, I see no escape for the plaintiff for the necessity of making the two averments required by this 18th section, and though what is stated leads almost inevitably to the inference that the cause of

action accrued before the defendant Letitia was married to her present husband; yet it cannot be said that it is formally alleged, and at all events there is no allegation that the defendant Letitia "has" separate estate, whatever time the word "has" points to.

This objection has received no answer, and appears to me fatal.

The plaintiff's counsel, however, at the close of the argument asked leave to amend. But under our Common Law Procedure Act, sec. 217, the application should be for leave to enter a suggestion of the omitted fact, and that leave will not be given unless the applicant shews by affidavit sufficient probable ground for believing that the final decision of the suggestion will be in his favor. I refer to *Manley v. Boycott*, 2 H. & B. 46, and *Fisher v. Bridges*, 2 E. & B. 118. In *Murgatroyd v. Robinson*, 3 Jur. N. 615, *Wightman, J.*, on an analogous application said it could not be done *ex parte*, but judgment might be suspended until the application be disposed of on summons.

It does not appear whether the bond be a joint bond only or a joint and several bond; the principal in one sum and the two sureties in another, or each surety in a separate sum. Nor are we called upon now to determine what effect a further and more complete statement of the facts in this case might have in influencing our judgment. All that we now determine is, that upon the case as disclosed we treat it as within the 18th section of the act referred to, and that the allegations required by that section cannot be dispensed with.

Unless the plaintiff within one month shall obtain leave to enter a suggestion, the rule to arrest the judgment must be made absolute as moved.

Per cur.—Rule absolute.

CORPORATION OF ESSEX V. PARK.

Treasurer of corporation—Separation of counties—Sureties—Bond.

A treasurer having been duly appointed for three counties, (while united) upon the separation of one from the other two counties.

Held, that a new appointment was not necessary. Consol. Stat. U. C., ch. 54, sec. 159, 174, 51.

An action being brought by a corporation against the sureties of their treasurer, the defendants contended that because money which had been collected by the treasurer and fraudulently charged as paid by him, was not demanded by the parties (the government) entitled thereto, they were not responsible therefor.

Held, that the liability of the treasurer was between the municipality and himself, he having received the money as their officer, and his responsibility was not altered by the government not demanding the money.

This case was referred back to the arbitrators by rule of court, on the 29th of September, 1860, who took further proceedings in the matter, and in Hilary Term last, *Albert Prince* obtained a rule *nisi*, to set aside the award on the following grounds:

1. The want of any valid appointment of George Ballock as treasurer for the periods during which the defendant was his surety.

2. That as to the bond of 1850, there was no sufficient execution thereof by the defendant, but a conditional or qualified signature; that there was no defalcation while this bond was in force; that neither bond is sufficient in law to support the action; that the resolutions of the county council shew these bonds were not accepted nor intended to be the securities required by the statute.

3. The defalcations alleged are in funds which the plaintiffs are not entitled to recover against the defendant.

4. The auditing and allowing of the treasurer's accounts by the auditors and finance committee of the council preclude the plaintiffs' recovery for defaults prior thereto.

5. The arbitrator has not sufficiently complied with the rule referring back the award in finding the facts required by the court.

6. The arbitrator has improperly refused to inform the defendant of the items of defalcation alleged so as to enable him to answer the same.

7. The evidence on which the award is founded is

insufficient to charge the defendant as is shewn by the arbitrator's answer to the question concerning the same.

8. The awarding costs of reference and award to be paid by defendant is an excess of authority.

The following additional objection was raised. Misconduct of the arbitrator in receiving illegal evidence of, and awarding on, matters in respect of which the evidence shewed there would be no legal claim against the sureties.

In Easter Term *Connor*, Q. C., shewed cause. *M. C. Cameron* with him.

The defendant's counsel gave up the second objection, and stated they should not support the fourth, though, with a view to possible proceedings in equity, they would not formerly abandon it.

DRAPER, C. J.—The defendant's first bond was given to the municipal corporation of *Essex, Kent and Lambton*, and bore date 30th January, 1850. It recited that *Geo. Bullock*, as treasurer for *Essex, Kent and Lambton*, had been called upon to give security, and was conditioned that he should faithfully perform all duties as treasurer, should receive and safely keep all moneys belonging to the counties, should pay all such sums as he should be directed by the order of the municipal corporation, should obey all by-laws, and as often as lawfully required should render just accounts for all moneys which should come to his hands as such treasurer, and should not suffer any misapplication or embezzlement of such moneys.

The defendant's second bond was dated the 30th January, 1851, and was given to the municipal corporations of *Essex and Lambton*, with a corresponding recital and a similar condition.

It was insisted there was no proof that *Bullock* had ever been appointed treasurer of *Essex and Lambton* after the county of *Kent* was set off as a separate county. There certainly was no proof to the contrary, and the recital to the second bond stated expressly that *Bullock* "as treasurer of the said united counties of *Essex and Lambton* has been

required by the municipal corporation of the united counties of Essex and Lambton to give security for the faithful performance of the duties of his office, and more especially for the due accounting for and paying over all moneys which may come into his hands by virtue of his office." This recital is sufficient evidence both of his appointment, and that the municipal corporation had required him to give security. Besides the appointment of treasurer to these united counties being clearly shewn, I do not see that a new appointment was necessary. (*Vide* Consol. Stat. U. C., ch. 54, sec. 159, 174, & 51.

Then as to the two items brought under our notice, the lunatic asylum tax for 1852, stated by the arbitrator to amount to £115 8s. 8d., and second, moneys received for sales of land in Essex and not credited to the plaintiffs for the Baby property.

As to the first, the contention on the part of the defendant, I understand to be, that inasmuch as the government are not claiming any thing to be due from the plaintiffs, on account of the lunatic asylum tax, they (the plaintiffs) can have no claim on the defendant as surety for the county treasurer for it. The arbitrator states that he allowed £115 8s. 8d. charged in Mr. Bullock's books as paid to the government on account of such tax when it was not paid; that this sum was received by him as appeared by his books, and was not accounted for, except falsely. It may be true that the government have now no claim on the plaintiffs for the money, but if the treasurer received it, he received it as the officer of the plaintiffs, and is accountable to them for it; but it was objected on the part of the defendant that the evidence on which the arbitrator founded his conclusion was illegal; that the entries in the books were not proof against the surety; that the mere verbal statements and explanations of Bullock were insufficient, and that he was not sworn.

There is no direct negative as to the question whether Bullock was sworn. An affidavit filed for the defendant states that the deponent did not see him sworn. The arbitrator states that he does not remember whether he was sworn or not. On the other hand the plaintiffs' solicitor

swears that he was present when Bullock was produced as a witness before the arbitrator, and "saw him duly sworn before giving his evidence herein," and further, the arbitrator in an affidavit states, "that the statements of Mr. Bullock referred to in an affidavit filed on the other side, relative to Bullock giving evidence," was received by me with the consent of *Mr. Prince*, counsel for the defendant, as an admission by the defendant of the matters in such statements contained." I think this ought to be conclusive, and that as to this item, the third objection is not sustained.

It is different as to the other, as to which the arbitrator makes the following statement of facts. That in and before the year 1849, one J. B. Baby was treasurer to the plaintiffs and was a defaulter, and that certain real estate of his in the county of Essex was sold in 1853, to liquidate the amount of the defalcation; that one John Sloan, the then warden, became purchaser for £588 6s. 11d.

That by a resolution of the municipal corporation of Essex and Lambton, Bullock was permitted to become the purchaser of said property by paying the purchase money aforesaid; that thereupon a deed was executed by Sloan to Bullock, and that it was not shewn to the arbitrator that this purchase money had ever been paid.

Taking this in the strongest point of view, it would establish that Bullock was indebted to the plaintiffs in the purchase money of this lot of land, but that debt was due from him as an individual and not as treasurer. To make it a debt due by him in the latter capacity, it must be shewn that the money of his own was so appropriated as to become the plaintiffs, and even then a question might arise whether it would be such a debt as the surety is responsible for; but the facts stated, I have no doubt, do not shew that in this transaction any money came to the hands of Bullock as treasurer, and for the debt due by him on a purchase of land for his own use and benefit, the defendant, as surety in either of these bonds, is not liable.

The defendant's counsel waived supporting the fourth objection, and it is therefore unnecessary to consider it.

As to the fifth objection, I have referred to the new matter

submitted to us by the arbitrator. I do not find any thing omitted which is now shewn either upon affidavit or during the argument should have been included. The synopsis of defalcation shews each several amounts in default, in each year separately, and the funds to which the moneys in default belonged.

The sixth objection is not now sustained in fact. No reference is made to it in the affidavits filed on this application.

The seventh objection is involved in the remarks made upon the third, and requires no further observation.

The eighth appears to be founded in mistake. The arbitrator, according to the copy of the award put in, does not award the payment of costs at all, but he assessed the costs of the award at £33 15s. 7d., not making any order as to their payment.

As to the last objection, it seems to me involved in the question as to the Baby estate chiefly, if not entirely. Upon this point at least it is unnecessary to say more. Upon the question of the lunatic asylum tax, the remarks made as to the evidence of Mr. Bullock, whether sworn (as the most direct evidence shews he was) or giving statements by way of explanation of the alleged defalcations, or of the meaning of entries, or accounting for the absence of entries in his books, explain the grounds on which I think it cannot properly be said there was illegal evidence admitted to establish this part of the claim.

It follows from this conclusion, that the award that the verdict should be entered for £701 15s. 7d. is wrong, for there was no legal evidence to charge the surety with the sum of £586 6s. 11d. Though the principal owed that sum to the plaintiffs, it was not for any thing that is shewn as treasurer, but in his individual capacity.

Unless, therefore, the plaintiff will consent to reduce the verdict to £115 8s. 8d., the amount of the lunatic asylum tax, the rule for setting aside the award must be made absolute.

Per cur.—Rule absolute.

PARKER v. McDONALD.

Covenant against acts of covenantor—Costs.

A. having mortgaged a lot of land to B., subsequently sold it to C., giving covenants against his own acts. B. subsequently foreclosed his mortgage, making C. a party to the suit, who employed a solicitor and incurred costs to the amount of £10 9s. 10d., which he claimed in an action he afterwards brought against A. for breach of his covenant.

Held, that the costs were incurred by the voluntary act of C., and were not a necessary consequence arising from a breach of the covenant, and were not recoverable against A.

DECLARATION for breach of a covenant contained in a deed dated the 21st January, 1857. The covenant was, that notwithstanding any thing by defendant done, &c., the defendant had in himself good right, full power, and absolute authority to convey lot 33, in range number one, as shewn on a plan of twenty-six acres, part of lot 25, south side of Bleam's road, in the township of Wilmot, with the appurtenances, to the plaintiff, and that defendant had not at any time theretofore done, committed, &c., any act, deed, matter or thing whatsoever, whereby the said lands were or might be affected or encumbered.

Breach—that defendant, before the making, &c., had mortgaged the said lands with other lands to J. V. L. in fee to secure payment of a large sum of money, which mortgage was in full force at the time of making the said covenant, and afterwards proceedings were taken in the Court of Chancery and the equity of redemption was foreclosed, and the title of the said J. V. L. become absolute in equity as well as at law, whereby plaintiff lost the land and his improvements thereon, and was put to expense in defending the Chancery suit.

Pleas.—Non est factum. 2nd, that the lands were not at the time of the sale thereof by defendant to plaintiff encumbered. Issue.

At the trial in April last at Toronto, before the Chief Justice of Upper Canada, the deed declared on was proved, and also the mortgage as stated, executed by defendant before the covenant was entered into. It was also proved that this mortgage had been foreclosed. The plaintiff was, with others, served with the bill. He consulted a solicitor,

but put in no answer. The solicitor, however, attended for him in the master's office until the final order, accounts were taken of payments on the mortgage in order to see what sum was due by defendant, and the plaintiff's solicitor attended while these accounts were taken. His bill against plaintiff for these services was £10 9s. 10d. The jury, under the direction of the learned Chief Justice, gave the plaintiff a verdict for the amount of his purchase money paid, and interest, and reserved leave for him to move to add the costs incurred by plaintiff in the Chancery suit.

In Easter Term, *R. A. Harrison* obtained a rule *nisi* accordingly, to which, in the following term,

M. C. Cameron shewed cause. He cited *Hodges v. Litchfield*, 1 Bing. N. C. 492; *Porr v. Davis*. 4 L. T. N. S. 399.

Harrison, contra, referred to *Clark v. Robertson*, 8 U. C. Q. B. 370; *Plumer v. Simonton*, 16 Q. B. U. C. 220; *Stubbs v. Martindale*, 7 C. P. U. C. 52; *Rex v. Dewhurst*, 5 B. & Ad. 405.

DRAPER, C. J.—*Collen v. Wright*, 8 E. & B. 647, comes nearer this case than any which I have seen. But there the Court only held the costs of a suit in Chancery, in which the plaintiff had endeavoured to enforce the contract entered into by the defendant in the name of a third party who had not authorised him, to be recoverable, because they were a natural and direct consequence of the defendant's (implied) contract with the plaintiff, that he had such authority. Here the plaintiff, though made a party to the suit to foreclose, was not subjected to any costs of the mortgagee, the plaintiff in that suit, nor did he appear to or incur any costs in defending it; whether his position gave him any right to redeem is unimportant for the purposes of this inquiry. His solicitor told him he had no defence, but nevertheless attended the taking the accounts in the master's office for the protection of the plaintiff's interests. These costs claimed by the plaintiff, are those charged by this solicitor for those attendances. They certainly cannot

strictly be deemed costs of the foreclosure suit ; they do not appear to me to be the natural and direct consequence of the defendant's breach of covenant. They must, I think, be looked upon as incurred voluntarily by the plaintiff, and not as a damage unavoidably incurred. I think, therefore, the rule should be discharged with costs.

Per cur.—Rule discharged.

During this term the following gentlemen were called to the bar :—JOHN MICHAEL TIERNEY, WILLIAM NICHOLAS MILLER, WILLIAM RALPH MEREDITH, PETER O'REILLY, JUNIOR, GEORGE EDWARD MOORE, WILLIAM STEVENS SENKLER, GEORGE HEMINGS, WILLIAM OLIVER MEADE KING, NICHOLAS MONSARRAT, WILLIAM DOUGLAS, ALEXANDER ROBERT MORRIS, FREDERIC HENRY STAYNER, WILLIAM PRYOR ATKINSON, WARREN ROCK, EDMUND JOHN HOOPEE, JUNIOR, HENRY ROBERTSON, WILLIAM FULLER ALVES BOYS.

MICHAELMAS TERM, 25 VIC.

Present :

The Hon. WILLIAM HENRY DRAPER, C. B., C. J.

“ “ WILLIAM BUELL RICHARDS, J.

“ “ JOHN HAWKINS HAGARTY, J.

KING V. DOUGHERTY ET AL.

Will.—Devise to brother if no issue born—Birth of issue.

A. being seized in fee of real estate makes the following will : “I give and bequeath to my wife (naming her) all that piece of land (in dispute) as long as she may remain a widow unless it should please God in His mercy within the next three months to give me issue by my wife now pregnant, in which case I bequeath the above to my said issue whether male or female.”

Second.—“In case there should be no issue, or in case my wife should marry again, I give and devise to my youngest brother, S. K., &c., all the above property subject to my wife's dower, and in case of his death to the next of kin in my own family.

Third.—“In case of the death of my wife whilst a widow, and without any issue as aforesaid, I also give and bequeath all my real estate to my youngest brother S. K., aforesaid, and failing him to my next of kin as above.

A son was born the day after the will bears date, (23rd July, 1855,) and died the 25th of October, 1855.

A. the testator died 23rd of August, 1855, and his widow 30th of January 1856, there being no other issue, and not having married again.

S. K. the devisee in the second and 3rd clauses brought an action claiming title thereunder.

Held, that the birth of the issue vested the estate in the widow of the testator, and that the defendants were thereby entitled.

ACTION brought on the twenty-eighth day of February, 1861, by the claimant against the defendants for the recovery of the west half of lot number eleven in the sixteenth concession of the township of East Zorra, in the county of Oxford, and by consent of parties, and by the order of the Honourable Mr. Justice *Hagarty*, according to “The Common Law Procedure Act,” the following case was stated for the opinion of the court without pleadings :

CASE.

Martin King, in his life-time, of the township of East Zorra, in the county of Oxford, and province of Canada, yeoman, elder brother of the above claimant, was seized of the above lands. He married on the thirty-first day of January, 1853, Margaret, daughter of Edmund Dougherty and sister of Daniel Dougherty, the defendants above-named, she being at the time of their marriage the mother of the two illegitimate children, who were named in her will hereinafter mentioned, such children resided with said Martin King, he being aware at the time of his marriage that his wife had given birth to them. From this marriage a son was born on the 24th of July, 1855, who received his father's name, of "Martin," (this being the sole issue of the marriage, and the issue whose anticipated birth is referred to in his father's will hereinafter recited, but which issue was born before the father's decease.

Martin King, the father, died on the 23rd of August, 1855. Martin King, the son, died on the 24th of October, 1855, two months after the father's decease, aged three months.

Margaret King, the wife, died on the 30th of January, 1856, without having married again, and in possession of the said land, having caused a memorial of the will of Martin King, hereinafter set forth, to be registered in the county of Oxford, on the eighth day of January aforesaid.

Martin King, the father, left the following will duly attested to pass real estate :

"In the name of God, amen, I, Martin King, of the township of East Zorra, in the county of Oxford and province of Canada, yeoman, of the age of forty-six years, and being of sound mind and memory do make, publish and declare this my last will and testament in manner following, that is to say :

"First, I give and bequeath to my wife Margaret Dougherty, all that tract or parcel of land situate in the township of Zorra East, being composed of the west half of lot number eleven, in the sixteenth concession of the said township, county and province, being one hundred acres, more or less, together with all the hereditaments and appur-

tenances thereunto belonging, or in anywise appertaining, as long as she may remain a widow, unless it should please God in his mercy within the next three months to give me issue from my wife Margaret Dougherty now pregnant; in which case I bequeath the above land to my said issue whether male or female.

"Second.—In case there should be no issue, or in case my wife should marry again, I give and devise to my youngest brother Samuel King, of the parish of Billingham, Sussex, England, all the above property, subject to my wife's portion or dower, and in case of his death to the next of kin in my own family.

"Third.—In case of the death of my wife Margaret whilst a widow, and without any issue as aforesaid, I also give and bequeath all my real and personal property to my youngest brother Samuel King aforesaid, and failing him to my next of kin as above.

"Fourth.—I hereby give and devise to my youngest brother Samuel King thirty pounds currency of the first moneys coming to me to enable him to bring his family out to this country.

"Fifth.—I give and bequeath all the rest, residue and remainder of my personal estate, goods and chattels, of what nature or kind soever, to my said wife Margaret, after payment of the above sum.

"And lastly.—I do hereby nominate and appoint my friends Edmund Deedes, of West Oxford, and John Barwick, of Blanford, to be executors of this my last will and testament, hereby revoking all former wills by me made.

"In witness whereof I have hereunto set my hand and seal, this twenty-third day of July, A.D., 1855."

Martin King, the father, left no brother or sister or other relative that would be entitled, except as under his will, but the claimant.

Margaret, the wife, only survived her husband as before-mentioned five months, and the infant issue two months. She left a will as follows, dated the sixteenth day of January, 1856, duly executed to pass real estate :

"This is the last will and testament of me, Margaret

King, of the township of Zorra, county of Oxford, Canada West, widow.

"I direct my executors hereinafter named, or the survivor of them, his heirs, executors or administrators, to stand and continue possessed of all moneys, notes or other securities for money, goods, chattels, estate and effects, of what nature or kind soever, or wheresoever the same may be at the time of my death, and to collect and then invest the same as soon as may be in good freehold mortgage securities, and to collect and invest the interest of the same as soon as may be upon trust for the benefit of my two children, minors, Jane and James Edmund, until they shall have attained respectively the age of twenty-one years. Then I give and bequeath the principal and interest accumulated, excepting such part thereof as my executors may have deemed necessary to expend on their education, to be equally divided between my said two children; but in case either of them should die without leaving any lawful issue, then the whole to be paid to the survivor; but should either of my said children die leaving lawful issue, then the said issue to be paid his or her share; but should it please God to take both of my children before they shall have attained their majority, then I give and bequeath the whole of the accumulated property to my brothers and sisters, or to their lawful issue respectively, share and share alike: that is the children of my brothers and sisters to receive their deceased parent's share out of the general bequest, except my household furniture and clothing, all of which I give and bequeath to my mother Jane Dougherty; and I do hereby nominate and appoint executors and trustees of this my will, William Powell of Blanford, yeoman, and my brother Daniel Dougherty, and declare my said executors or the executors of either of them, shall be answerable for such sums only as they shall respectively receive by virtue of the trusts hereby in them reposed."

After the decease of Margaret King, the wife, the defendant Edmund Dougherty, her father, took possession of the property, claiming the same as heir at law to his daughter, on the ground of her becoming seized as heir at law to her

infant son, the issue of Martin King, as aforesaid, and on the ground of her being devisee in fee under the will of her husband and the defendant Daniel Dougherty claims as the lessee of his father the said Edmund Dougherty, or as devisee under the will of his sister above set forth.

The question for the opinion of this court was, whether the claimant or defendants on the foregoing state of facts were entitled to the property, the former as the heir at law of his brother, or the latter as the heir at law or devisee of said Margaret King, and if the court should be of opinion in favour of the claimant, judgment to be entered for him as on a verdict for the plaintiff. If in favour of the defendants' judgment as in case of a verdict for defendants to be entered, and costs of suit to be awarded to the successful party.

J. H. Cameron, Q. C., and Harman, for plaintiff, contended that the widow took no estate she could devise—1 Pow. Dev. 187. Supposing the word "issue" to be a word of limitation, what estate will pass under sec. 12, Consol. Stat. U.C., 831? That the will was to be looked at as granting an estate tail or an estate to issue at the death of the wife.—*Hope v. Taylor*, 1 Burr. 269; *Denn v. Slater*, 5 T. R. 335; 2 Powell on Dev. 364, 573, 529; *Ginger v. White*, Willes 348; *Wright v. Pearson*, 2 Lord Ray. 1437; *Lethieullier v. Tracy*, 3 Atk. 774, 793; *Young v. Turner*, 30 L. J. N. S. Q. B. 268.

Beard, contra, cited *Forth v. Chapman*, Tudor's Leading Cases, 552; *Jordan v. Adams*, 6 C. B. N. S. 748; *Lees v. Mosley*, 1 Y. & C. Ex. 589.

DRAPER, C. J.—Three things appear to have been present to the mind of the testator, when he made his will. 1st, the near approach of his own death. 2nd, the expectation that a child would shortly be born to him. 3rd, the disposal of his estate, if this expectation should be disappointed.

The first clause of the will either gives the estate to the wife for life, remainder in fee to the expected child, or

by reason of the words which follow the gift to the wife, "*unless it should please God in his mercy within the next three months, to give me issue from my wife now pregnant, in which case I bequeath the above to my said issue, whether male or female,*" cuts out the wife altogether, and vests the fee at once in the child. As things now stand, this question is unimportant.

A son was born the day after the will bears date, and a month afterwards the testator died. The son either took the estate in fee absolutely, or the remainder expectant on the determination of his mother's life estate.

The argument for the plaintiff is that the second clause of the will overrides this, by which, "in case there should be no issue," or in case the wife should marry again, the estate was devised to his younger brother. It is contended that here the testator uses the word "issue" as meaning not merely the child referred to in the first clause, but any other child or children the testator might have by his wife, and that reading the third clause: "In case of the death of Margaret whilst a widow and without any issue as aforesaid, I give and bequeath all my real and personal property to my youngest brother," in connexion with the second, the language of the first clause is controlled, and the wife, instead of a life estate takes an estate tail, with remainder in fee to the youngest brother.

It appears to me this is not to construe the will as a whole, but to adopt an artificial and technical construction of the second and third clauses in order to overturn the plainly expressed intention set forth in the first, whereas it is more reasonable to take that plain intent as the guide in construing the latter clauses. The testator has used the word "issue" in the first clause to designate the child with which his wife was then pregnant, and the court is asked to construe the same word to have a very different meaning when used directly afterwards. Taking the whole will together, the separate object of each of these clauses seems to be by the first clause to provide for the disposal of the testator's estate, in case the expected child was born, by the second to dispose of the estate in case there was no such child born,

and the widow married a second husband, and by the third to dispose of the estate, in case there was no child and the widow did not marry again. The language used in the second and third sections plainly intimates the testator's idea that he had given his wife a life interest in the estate, while she remained his widow—by the first clause, although the child was born, for in neither of the two subsequent clauses is there any gift to her; the gift over to testator's younger brother is alone expressed, with the event upon which it is to take effect.

In my opinion that event has never happened, it is a compound event, and one part is, that no child should be born according to the expression in the first clause. The child was born, and that defeated the limitation over.

But for the astute and able argument of Mr. Cameron, I should not have hesitated an instant in coming to a conclusion. He has failed to convince me, however, that the testator meant to give his widow an estate limited to the heirs of her body, though begotten by himself.

In my opinion the *postea* should be delivered to the defendant.

In coming to this conclusion I must add, that I believe that if the testator had contemplated the contingency which has happened, he would have provided for it, and have given the land to the claimant. I do not think he ever thought the fee would come to his wife as inheritrix to the child. This consequence results from the change made in the old and well-understood law of inheritance as it stood prior to our statute. But for that change the land, in the events which took place, would not have passed out of the blood of the testator, and have been disposed of for the benefit of the illegitimate children of his wife.

I have carefully read the case of *Young v. Turner*, 30 L. J. N. S. Q. B. 268; but it does not appear to me to affect this case. There the court held themselves bound by the expressions "*leaving only one child*," and "*without leaving any issue of her body at the time of her death*," to construe the will as making the gift to the issue contingent on the issue surviving the tenant for life.

In this case it might be questioned whether the devisee to the wife for life was not defeated by the birth of a child, though I give no opinion in favor of such a conclusion.

But the expression in the second clause, "*in case there should be no issue*," shews the language of the third clause "in case of the death of my wife Margaret, whilst a widow, and without any issue as aforesaid," to be, without having borne issue to the husband. I think it would be doing violence to the language used to construe it, taken altogether, to mean that the devise to the issue was contingent on the child that was born surviving the mother. The case of *Slater v. Dangerfield*, 15 M. & W. 263, affords an answer to Mr. Cameron's argument, that the widow took an estate tail.

In the first clause the word "issue" evidently means a child of the testator, male or female, borne by his wife. The words in the second clause "*in case there should be no issue*" as evidently mean in case the wife should bear no such child. And the words in the third clause, "without issue" as "*aforesaid*," must be construed by the meaning of the word "issue" in the preceding clauses.

See *Goodright v. Dunham*, 1 Dougl. 264; *Malcolm v. Taylor*, 2 Russ. & Myl. 416; *Doe v. Selby*, 2 B. & C. 926; 2 *Jarm on Wills*, 375.

HAGARTY, J.—The wife seems the first object the testator thought of. He knew she was pregnant, and apart from the event of her having issue by him from such pregnancy, gave his estate to her so long as she should remain his widow—in case she should marry again, he gave the estate to the plaintiff, his brother, and in case of her continued widowhood, on her death without issue, then in like manner in fee to the plaintiff.

This seems his clearly expressed view as to his wife in default of either of the supposed events—a second marriage or birth of issue by testator. He does not seem by the language used by him to have looked beyond either of these contingencies. Issue is born from the pregnancy to which he specifically alludes. If he did not consider the very pos-

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At testator's death there is issue, him surviving, capable of taking and exactly answering the description in the will, I hardly see how it is possible to avoid the conclusion, that the whole estate of the testator in the land, thereupon vested absolutely in the issue so born.

It is suggested that the words subsequently used cut down the estate given in the first clause to an estate tail in the issue so born. To have this effect, the intention should, I consider, be clear and unequivocal. In the second section he gives his estate over to plaintiff; "in case there should be no issue, or in case my wife should marry again."

The testator, I think, clearly meant in case there should be no issue capable of inheriting his estate after his death, no issue, contemplated in the first clause, of which his wife was pregnant. It is unnecessary to consider the case of other issue of testator born afterwards, unconnected with the pregnancy specially alluded to. The will gives me the idea of a man having his eye on the result of that single event, the existence or the failure of that particular issue.

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He intended his issue, i. e., the expected son or daughter, to have his estate absolutely if living when his will would become operative at his own death; this did happen, the issue did survive him, and I can find no words in the will to warrant our cutting down the estate which the first clause gave absolutely, I think, to such issue.

The very ingenious meaning given by Mr. *Cameron* to the whole will is intelligible only to lawyers conversant with the various natures of estates, and never could, I think, have been present to the mind of this testator, when he used the plain, though inartificial language we are now called on to expound.

In one of the cases cited by him, *Ginger ex dem. v. White, Willes*, 348, *Willes*, C. J., says: "The rule of law is that a precedent estate devised by express words cannot be lessened, increased or altered by implication, though it may be by express words."

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Per cur.—*Postea* to defendants.

KING V. GLASSFORD.

Bill of exchange—Acceptor resident in Lower Canada—Statute of Limitations—How far entitled to set up under a plea of payment—Stat. 12 Vic., ch. 22, sec. 31.

Held, that the period of limitation provided by the statute (12 Vic., ch. 22, sec. 31) relative to debts due in Lower Canada must be specially pleaded, and that the limitation thereby created cannot be proved under a plea of payment.

Held, also, that the judge of the county court has power to allow pleas to be added in cases sent down from the superior courts to be tried by him, as well as in actions commenced in his own court.

The declaration stated that defendant was sued jointly with one James A. Walker (the defendant having heretofore

pleaded the non-joinder of Walker, and that the writ was specially endorsed, thus: "The following are the particulars of the plaintiff's claim, £204 15s. 8d., on a bill of exchange for that amount, dated the 29th November, 1854, accepted by the defendants, with interest and notarial charges; £100 Cr., in April, 1856. The plaintiff claims interest on £204 15s. 8d., from December, 1854 to April, 1856, until judgment. N. B.—Take notice that if a defendant served with this writ within Upper Canada do not appear according to the exigency thereof the plaintiff will be at liberty to sign final judgment for any sum not exceeding the sum above claimed with interest, and the sum of £7 10s. for costs, and issue execution at the expiration of eight days from the last day for appearance." The declaration then suggested that Walker did not appear, and that judgment was signed against him, and plaintiff declared against defendant; that plaintiff, on the 29th November, 1854, by his bill of exchange directed to the defendants under the name, style and firm of Glassford, Walker & Co., required the defendants to pay to plaintiff £204 15s. 8d., fifteen days after sight, but they did not pay the same.

Common counts for freight, and money counts.

Pleas.—1st. Payment. 2nd. That the alleged cause of action did not arise within six years.

Issue on the first plea.

Replication to 2nd, that when the cause of action accrued the defendant was in parts beyond the jurisdiction of this honourable court, *i. e.*, at Montreal, in Lower Canada, and defendant, after the accruing &c., to wit, on the first of January, 1860, returned from, &c., which was defendant's first return within the jurisdiction, and that plaintiff commenced his action within six years next after. Issue thereon.

A judge's order was made for the trial of these issues before the judge of the county court of Frontenac, Lennox and Addington, within which the action was commenced.

The foregoing statement of the pleadings is taken from the record on which the case was tried in June, 1861.

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This seems his clearly expressed view as to his wife in default of either of the supposed events—a second marriage or birth of issue by testator. He does not seem by the language used by him to have looked beyond either of these contingencies. Issue is born from the pregnancy to which he specifically alludes. If he did not consider the very pos-

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Per cur.—*Postea* to defendants.

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Held, that the period of limitation provided by the statute (12 Vic., ch. 22, sec. 31) relative to debts due in Lower Canada must be specially pleaded, and that the limitation thereby created cannot be proved under a plea of payment.

Held, also, that the judge of the county court has power to allow pleas to be added in cases sent down from the superior courts to be tried by him, as well as in actions commenced in his own court.

The declaration stated that defendant was sued jointly with one James A. Walker (the defendant having heretofore

pleaded the non-joinder of Walker, and that the writ was specially endorsed, thus: "The following are the particulars of the plaintiff's claim, £204 15s. 8d., on a bill of exchange for that amount, dated the 29th November, 1854, accepted by the defendants, with interest and notarial charges; £100 Cr., in April, 1856. The plaintiff claims interest on £204 15s. 8d., from December, 1854 to April, 1856, until judgment. N. B.—Take notice that if a defendant served with this writ within Upper Canada do not appear according to the exigency thereof the plaintiff will be at liberty to sign final judgment for any sum not exceeding the sum above claimed with interest, and the sum of £7 10s. for costs, and issue execution at the expiration of eight days from the last day for appearance." The declaration then suggested that Walker did not appear, and that judgment was signed against him, and plaintiff declared against defendant; that plaintiff, on the 29th November, 1854, by his bill of exchange directed to the defendants under the name, style and firm of Glassford, Walker & Co., required the defendants to pay to plaintiff £204 15s. 8d., fifteen days after sight, but they did not pay the same.

Common counts for freight, and money counts.

Pleas.—1st. Payment. 2nd. That the alleged cause of action did not arise within six years.

Issue on the first plea.

Replication to 2nd, that when the cause of action accrued the defendant was in parts beyond the jurisdiction of this honourable court, i. e., at Montreal, in Lower Canada, and defendant, after the accruing &c., to wit, on the first of January, 1860, returned from, &c., which was defendant's first return within the jurisdiction, and that plaintiff commenced his action within six years next after. *Issue* thereon.

A judge's order was made for the trial of these issues before the judge of the county court of Frontenac, Lennox and Addington, within which the action was commenced.

The foregoing statement of the pleadings is taken from the record on which the case was tried in June, 1861.

It was proved that defendant Glassford had resided in

and trouble, did trace and discover one Seth Smart to be the murderer of, &c., the plaintiff did give such information to the defendants as would lead to the conviction of the said Smart, and did discover and trace the said Smart to be the murderer in the said advertisement mentioned, and the said Smart afterwards was duly arrested and committed to the common gaol of the county of Prince Edward, in which county the murder was committed, to answer on the said offence, and whilst so imprisoned, the said Smart feloniously committed self-murder, and the plaintiff applied to the defendants for the reward, but they have not paid the same.

Common counts.

All the defendants except Dougall join in pleading.

2nd. That the advertisement in the declaration mentioned was in the words and figures following:

"Proclamation. Whereas Abraham and Sarah Peterson were murdered in their house in the township of Sophiasburg, on the night of Friday, the 12th of October, 1860. Therefore the magistrates of the county of Prince Edward hereby offer a reward of \$800 to any person or persons who will give such information as will lead to the conviction of the murderer or murderers. By order of the magistrates in special session. Ph. Low, Crown Attorney. Dated at Picton, 13th October, 1860."

And the plaintiff did not give such information as led to the conviction of the murderer or murderers of the said Abraham and Sarah Peterson.

3rd. That the said Smart was never convicted of the murder of the said Abraham and Sarah Peterson.

The defendant Dougall pleads: 3rd. That the plaintiff did not give the first information leading to the conviction of the said Smart.

The plaintiff demurred to Dougall's third plea, and to the second and third pleas of the other defendants.

The first ground of demurrer was that the said second plea is no answer in law to the first count of the declaration.

Second.—That the plea assumes that it is necessary in order to maintain this action that the murderer or

murderers of the said Abraham and Sarah Peterson, was or were actually convicted, whereas it is only necessary under the declaration and under the advertisement recited in the said plea that such information should have been given by the plaintiff as would have led to his or their conviction if he or they had been brought to trial.

Third.—That the said plea denies a state of facts which are not set up in the declaration: the plea says that the plaintiff did not give such information as led to the conviction of the said murderer; the declaration does not say that such information led to the conviction; it says in effect that it would lead to it if he was put upon his trial.

Demurrer to 3rd plea.—First, that the said third plea is no answer in law to the said first count of the declaration.

Second.—That the said plea asserts what is admitted and asserted in said first count of the declaration, namely, that the said Seth Smart was never convicted of the murder of the said Abraham and Sarah Peterson, and therefore no answer to the declaration.

Demurrer to Dougall's third plea.

1st. That the said third plea is no answer in law to the said first count of the declaration.

2nd. That the third plea traverses matter not alleged in the said first count.

3rd. The third plea assumes that in order for the plaintiff to maintain the action it is necessary that the said Seth Smart should have been convicted upon the information first given by the plaintiff whereas in fact it was only necessary for the plaintiff to give such information in the premises as would have led to the said Smart's conviction, had he been brought to trial and duly prosecuted according to law.

4th. The said third plea throws on the plaintiff the necessity of proving that the said Seth Smart was duly convicted upon the information first given by the plaintiff, whereas the said first count expressly shews why the said Seth Smart was not in fact convicted.

And the defendant, Aaron D. Dougall, says that his third plea is good in substance.

In this case it might be questioned whether the devise to the wife for life was not defeated by the birth of a child, though I give no opinion in favor of such a conclusion.

But the expression in the second clause, "*in case there should be no issue*," shews the language of the third clause "*in case of the death of my wife Margaret, whilst a widow, and without any issue as aforesaid*," to be, without having borne issue to the husband. I think it would be doing violence to the language used to construe it, taken altogether, to mean that the devise to the issue was contingent on the child that was born surviving the mother. The case of *Slater v. Dangerfield*, 15 M. & W. 263, affords an answer to Mr. Cameron's argument, that the widow took an estate tail.

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Pleas.—1st. Payment. 2nd. That the alleged cause of action did not arise within six years.

Issue on the first plea.

Replication to 2nd, that when the cause of action accrued the defendant was in parts beyond the jurisdiction of this honourable court, *i. e.*, at Montreal, in Lower Canada, and defendant, after the accruing &c., to wit, on the first of January, 1860, returned from, &c., which was defendant's first return within the jurisdiction, and that plaintiff commenced his action within six years next after. *Issue* thereon.

A judge's order was made for the trial of these issues before the judge of the county court of Frontenac, Lennox and Addington, within which the action was commenced.

The foregoing statement of the pleadings is taken from the record on which the case was tried in June, 1861.

It was proved that defendant Glassford had resided in

Montreal since 1850; that there was a cargo of iron, 20½ tons 15 cwt., carried by plaintiff for defendant from Lachine to Hamilton at \$4 per ton freight, amounting to £204 15s. The bill of exchange produced was drawn for the freight on defendant by plaintiff. The bill was dated "St. Catharines, 29th November, 1854. £204 15s. 8d.—Fifteen days after sight please pay to my own order at the agency of the Bank of Upper Canada in Montreal the sum of two hundred and four pounds, fifteen shillings and eight pence, currency." Signed by plaintiff, and addressed to Messrs. Glassford, Walker & Co., Montreal. And accepted by them 12th December, 1854. A letter from defendant Glassford to plaintiff, dated 31st August, 1859, was also put in, in which is this passage; "but rather than to have any more trouble, and to reimburse you in part, if you will withdraw your suit I will pay you five shillings in the pound, say \$150, to clear me. You can if you think proper look to the other parties for their proportion."

This was the plaintiff's case. For the defence it was objected that the plaintiff could not proceed upon the common counts, as the writ is specially endorsed for a bill of exchange and judgment signed against the defendant Walker on the bill only, and that no particulars of claim on the common counts had been served. And that as the bill of exchange was payable in Lower Canada, it must, according to *Hervey v. Jacques*, 20 Q. B. U. C. 366, be considered as absolutely paid, and so the plea of payment was proved. The learned judge overruled the objections. The defendant's counsel then moved to add a plea specially pleading the statute 12 Vic., ch. 22. This was refused on the ground that the judge had not, as he thought, power to grant it. The learned judge held that the plea of payment meant actual payment, not a bar by the lapse of five years, which the statute declared to be a payment and satisfaction, and that the plaintiff could not recover on the common counts as he had proved nothing beyond the bill of exchange and the matter for which it was drawn.

A verdict was given by consent for plaintiff for £158 3s. 10d., with leave reserved to defendant to move to enter a nonsuit on the objections raised.

In Trinity Term *Richards*, Q. C., obtained a rule nisi to enter a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for misdirection, and for mistake on the part of the judge in ruling that he had no power to amend the pleading. That on the evidence and the 12 Vic., ch. 22, the bill of exchange must be taken to be paid, no suit having been brought thereon within five years after it became due. That plaintiff could not recover on the common counts, because judgment was signed against Walker for want of appearance, and the writ was not specially endorsed for any claim under the common counts; that no particulars on the common count were served. Or to arrest the judgment as the verdict is general, and the first count is bad for not shewing that the defendant's accepted the bill. That the common counts could not be added in the declaration with the count on the bill, no claim on those counts having been endorsed on the writ on summons, and judgment having been signed against Walker for want of appearance. That there is a misjoinder on the record of a bill of exchange against two defendants, and the common counts against one, and there cannot be a joint judgment on all the causes of action stated in the declaration.

Gwynne, Q. C., shewed cause, contending that all statutory defences in bar of a right must be pleaded. 1 Chitty Pl. 504; *Wheeler v. Senior*, 9 Dowl. 270. All questions of pleading and evidence are to be disposed of by the *lex fori*; *Don v. Lippman*, 5 Cl. & F. 1, and this defence comes within that doctrine. He cited *Benham v. Earl of Morington*, 3 C. B. 134; *Ritchie v. VanGelder*, 9 Ex. 762; *Fromant v. Ashley*, 22 L. J. Q. B. 237; S. C., 1 E. & B. 723; *Wilkin v. Reed*, 15 C. B. 192.

Richards, Q. C., contra.—The defendants became parties to the bill in Lower Canada; by accepting their liability was contracted there, and it was payable at a particular place there and therefore within the statute. He cited *Mitchell v. Crassweller*, 13 C. B. 237; *Brennan v. Howard*, 1 H. & N. 138.

DRAPER, C. J.—I incline to think that the learned judge

of the county court had authority to allow a plea to be added. He possesses that authority in actions brought and tried in his own court, and in reference to cases sent down from either of the superior courts to the county court, they are to be tried in the same manner as ordinary cases tried therein. But unless we see clearly not only that he had the power, but ought to have exercised it, we should not on this objection grant a new trial. I should not, as at present advised, have allowed the plea to be put upon the record. The statute is stringent in its operation on the interests of plaintiffs not residents of Lower Canada, and very probably not aware that there is a difference in the periods of limitation between the two divisions of the province. It makes no allowance for any disabilities, and affords no relief under any circumstances whatever to a plaintiff, when the prescribed period of five years has gone by. It is not, I think, too much to say that if a defendant omits to invoke its protection at the proper time and in the proper manner, he must shew a strong case on the merits to induce the court to assist him.

I feel no doubt that the statute (12 Vic., ch. 22, sec. 31) must be specially pleaded, and that the enactment "that the bill shall be held and taken to be absolutely paid and discharged" cannot be set up under a common plea of payment. The plaintiff's action is not barred under all possible circumstances by the lapse of five years, for the action may have been commenced and kept alive though the bill was due more than five years before declaration filed. The plaintiff would be wholly taken by surprise if such a defence were set up under a plea which apparently would require no special replication. If a construction of the act strictly literal were adopted, it might be argued that under the words, "if no suit or action is brought thereon within five years," &c., a replication would be good to a plea setting up the statute, confessing the plea so far as the pending action was concerned, but avoiding it by shewing a former action instituted within the limited period, but discontinued.

On the pleadings as they stand the verdict appears to me right. There was no proof of actual payment but the

defendant relied on the statute, and lapse of five years without suit as proof of payment. This, as I have already said, in my opinion was not proof under this plea. Upon the issue on the plea of *actio non-accrevit infra sex annos* it has not been contended the verdict is wrong.

I think, therefore, the plaintiff was entitled to recover on the bill, and it is consequently needless to consider the latter part of the rule. The plaintiff must get rid of the common counts as he may be advised. He will have to pay the costs of doing this, whatever course he may adopt. If he fails to do this, I apprehend he will be unable to get on, but I am willing to give him an opportunity of curing this difficulty. I have no difficulty in allowing the record to be amended by the declaration filed

Per cur.—Rule discharged.

FORTIER V. WILSON ET AL.

Proclamation—Reward—Conviction—When necessary that it should take place before reward payable.

Declaration for a reward of \$800 offered by the defendants to any person giving such information as would lead to the conviction of the murderer or murderers of certain persons therein named.

The defendants pleaded that the plaintiff did not give such information, &c., and that the said murderer was not convicted, it appearing that the accused, while waiting his trial, committed suicide in gaol. Upon demurrer.

Held, that the actual conviction of the party accused was a condition precedent to the recovery of the reward, and that the committing of suicide by the accused did not entitle the plaintiff to a verdict.

The declaration stated that the defendants on the 15th of October, 1860, published an advertisement whereby they offered and promised a certain reward to any person or persons who would give such information as would lead to the conviction of the murderer or murderers of Abraham Peterson and Sarah Peterson, who were murdered in their house in the township of Sophiasburg, on the night of Friday, 12th October, 1860, and the defendants did thereby promise that whoever would give such information as would lead to the conviction of the murderer or murderers aforesaid, should receive a reward of \$800, on application to the defendant, and the plaintiff says that he afterwards, at great expense

Averment that the defendant hath not yet paid the amount of the stock taken by him or any part thereof, although he is still a shareholder in the said company to the extent of ten shares, and that the whole amount of the said stock, equal to £100, is still unpaid, whereby, and by force of the statutes an action hath accrued to the plaintiffs to demand from the defendant the amount due on the execution.

The defendant demurred because, 1st. The judgment was recovered in this court, and the *venue* is laid in the county of Durham, instead of in the county where the judgment and record are, *i. e.*, the county of the city of Toronto.

2nd. That it is not shewn that a writ of *fi. fa.* against the goods of the Port Hope, Lindsay & Beaverton Railway Co., issued to the sheriff of the united counties of Peterboro' and Victoria, and part of the railway and stations are in those counties, and there may have been goods and chattels in those counties to satisfy the writ.

Eccles, Q. C., and *Bethune*, for the demurrer, contended that a creditor cannot sue a stockholder for calls not made by the directors; that until a call is made no debt is due. *Smith v. Russell*, 8 Q. B. U. C. 387. They also argued that a *fi. fa.* goods, must be returned *nulla bona* in the county into which the *fi. fa.* lands is issued.—*Ness v. Fenwick*, 2 Ex. 598.

Armour, contra, cited *Moore v. Kirkland*, 5 C. P. U. C. 452, as to calls being necessary. The *Cork, &c., Railway Company v. Goode*, 13 Com. B. 826.

DRAPER, C. J.—In addition to the objections taken as grounds of demurrer on the record, it was objected at the argument, that the declaration contained no averment that the defendant's stock had been duly called for by the directors according to the provisions of the charter; that by the 19th section of 14 & 15 Vic., ch. 15, the legislature certainly had not made this a necessary preliminary to the defendant's liability as a shareholder to the present plaintiff, but they must have meant it, because it would be unjust to alter the terms and conditions on which he became a shareholder,

upon which the stock could only be called in by limited amounts at fixed intervals; that the legislature could only have intended to give to the creditors of the railway company the same right to sue the shareholders which the company possessed, and the company could not sue for calls until they were regularly made.

The learned counsel who urged this spoke of it as a new idea that had struck him. I am satisfied that if he had given it a second thought, he would have strangled it in its birth. Its refutation is contained in the words of the section of the act referred to, which, as I have to make a remark on it in reference to the last of the objections appearing in the demurrer book, I may as well quote now.

"Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities thereof, and until the whole amount of his stock shall be paid up, but shall not be liable to an action therefor before an execution against the company shall have been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholders."

I fail to discover any support for the new idea in this provision, and the idea after all is not new, for the question that in an action like the present, calls must be made by the company before the plaintiff can recover, was raised in *Moore v. Kirkland*, 5 C. P. U. C. 452, and the court decided that such calls were unnecessary under the statute.

Then as to the *venue*, I am of opinion that it is not local. The action is founded on the liability created by the statute, making every shareholder individually liable for the debts of the company in which he is a shareholder, to the unpaid amount of the stock which he holds. These few words contain all the liability of the shareholder, and all the right of the creditor of the company to sue him; what follows is a *quasi* condition precedent to bringing the action. The creditor has first a right of action against the shareholder conferred on him, then a restraint is imposed upon bringing the action until an execution is issued, (which assumes rather

than requires a judgment recovered,) and is returned unsatisfied. I see no greater reason for holding the judgment to be the foundation of the action than for holding the delivery of a bill by an attorney before he can sue to recover its amount, to be the foundation of the attorney's right. In each case the thing is rendered necessary as a preliminary to bring the action; but the cause of action rests on other and different grounds. If a declaration were framed on the very words of our act, it would contain no averment of the recovery of a judgment, though it must state that an execution was issued and returned unsatisfied; and even conceding that the declaration must shew a judgment, why should the *venue* be local in this more than in an action for escape or for false return, wherein, there is no question, the judgment must be set out?

The last objection is that it should be averred that an execution against goods issued into every county where the railroad runs. The statute speaks only of an execution against the company, not hinting at the necessity of more than one. I agree the execution must be issued for the purpose of obtaining satisfaction if it can be had—it is not to be a mere illusory formal proceeding, to give color to proceedings against a shareholder, and possibly the shareholder might defend himself successfully by shewing the company had goods which might have been taken, or he might, if injured by negligence or connivance on the sheriff's part, have a remedy against him. The law requires a *fi. fa.* against goods to be returned before a *fi. fa.* against lands can issue. Yet it has, I believe, been always considered sufficient to issue that writ to the sheriff of the county in which the *venue* is laid, though the defendant may not reside therein. I have found no authority deciding the question, but I am prepared to hold that it is enough for the plaintiff to shew in his declaration what is shewn here. If the proceeding has been illusory or fraudulent, it appears to me that the suggestion of it should come from the defendant.

In my opinion the plaintiffs are entitled to judgment.

Per cur.—Judgment for plaintiffs.

THE GREAT WESTERN RAILWAY COMPANY, DEFENDANTS,
(APPELLANTS,) AND VILAIRE, PLAINTIFF, (RESPONDENT.)

*Railway, &c., crossing—Fencing—Private easement—Acceptance of gates
in lieu of fence.*

Declaration against defendants for neglecting to erect and maintain sufficient fences upon the line of their railway, whereby plaintiff's horses and colts strayed on the railway track and were killed, &c.

Plea, that the railway was constructed on the plaintiff's farm on a level and gateways put in the fence for his convenience, which it was his duty to keep closed and fastened, but that he allowed them to get open and out of repair by means whereof, &c.

On demurrer, *held*, that the acceptance and use of gates by the plaintiff was a waiver of the duty imposed upon the defendants to fence their line or road, and that having once accepted the fence in that state it was not the defendants' duty to use extraordinary means to prevent accidents.

Held, also, that an agreement to accept and see to gates on the plaintiff's farm, in place of fences, is not an agreement in relation to land coming within the Statute of Frauds.

The plaintiff declared, that at the time, &c., it was the duty of defendants to erect and maintain sufficient fences on the line of the route of their railway; yet defendants neglected to erect and maintain sufficient fences upon the line, &c., where the same crossed the plaintiff's farm, by reason whereof two mares and colts of plaintiff's strayed from plaintiff's lands, where they lawfully were, upon the railway, and one mare and the colt were killed, and the other mare injured.

Plea, that the railway was constructed across the farm of the plaintiff, dividing the farm into two portions; that defendants erected fences along the lines of division, and for the convenience of plaintiff, erected a level crossing so as to enable plaintiff, &c., to cross from one part of his farm to the other, and defendants constructed gates with fastenings on each side of the crossing, to enable plaintiff to pass through, which gates and fastenings form part of the said fences separating the railway from the plaintiff's land, and plaintiff accepted the crossing with the gates and fastenings, and used the same up to the time when, &c., without any notice to defendants that the gates or fastenings were insufficient or defective, by reason whereof it was the plaintiff's duty to keep the gates closed, so as to prevent horses and cattle from getting on the railway, that plaintiff's mares and colts got out of plaintiff's land upon the railway by reason of one of the said gates not having been kept closed, and

so the said supposed grievances happened by and through the neglect and default of the plaintiff, and not by reason of any neglect of duty on the part of the defendants.

The plaintiff demurred, to this plea and got judgment on the demurrer in the county court. That judgment is appealed from.

Irving, for appellants, on the demurrer cited *Haigh v. L. & N. W. Ry.*, 1 F. & F. 646; *McLennan v. G. T. Ry. Co.*, 8 U. C. C. P. 411.

O'Connor, for respondent, cited *Henderson v. G. T. Ry.* 20 U. C. Q. B. 602.

DRAPER, C. J.—The breach alleged relates exclusively to the defendants' duty to erect and maintain fences; there is no breach arising under the provisions of 18 Vic., ch. 176, sec. 8.

The railway in this particular place is alleged to have been constructed across the plaintiff's land, and in the *locus in quo*, therefore no public right or easement was interfered with. The plea states that for plaintiffs convenience the defendants constructed a crossing with gates and fastenings, the gates forming part of the fences which the defendants were bound by law to erect, and that plaintiff accepted such gates and fastenings. If so, I think he must be taken to have agreed that a part of the fence separating his land from the railway should, for his accommodation be made moveable as gates are, instead of being fixed. This change, made by defendants for plaintiff's accommodation, without, so far as is shewn, any obligation on defendants to make it, cannot in reason be held to impose an additional obligation on the defendants and to make it their duty to see that the gates are closed and properly secured, every time that the plaintiff or others by his direct or implied authority or license pass through them. The plaintiff, by accepting the gates, must, I think, be held to have acquiesced in the fence being so constructed.

I do not find any obligation imposed by law upon the Great Western Railway Company, to erect gates for the convenience of the proprietors of lands, dissevered by the railway.

The severance of a farm, by the railway passing through it, would be a subject of compensation, and in settling that compensation, arrangements, such as the plea states, would appear reasonable; but we are not to assume more than the plea states, though bound to notice every duty imposed by the statutes upon the company. The duty to make and maintain fences is absolute, and the question is, whether the plea sufficiently shews that the duty was fulfilled; the plea must shew so much, as I do not think that the alleged acceptance by the plaintiff relieved the defendants from maintaining and keeping in repair the gates and fastenings as a part of the continuous fence, and I see no sufficient reason for holding that they were not as much bound to examine into the condition of the gates and fastenings, as regarded their being maintained in a proper and efficient condition as any other part of the fence. I see no value therefore in the allegation that the plaintiff used the gates and fastenings without any notice to the defendants that the same were insufficient, insecure and defective. This allegation amounts indirectly to an admission that the gates and fastenings were insufficient, &c., and affords no answer to the breach, charging that the defendants neglected to maintain sufficient fences. But I take the substance of the plea to consist in the allegation that the plaintiff's mares and colt got out of his land and on to the railway by reason of one of the gates not having been kept closed, and so the injury arose from the plaintiff's neglect and default, and not by reason of any neglect of duty on the part of the defendants. Although not so distinctly charged as it might easily have been, I understand the plea as an assertion, on the defendants' part, that it was the plaintiff's duty, under the circumstances, to see to the proper closing and keeping closed the gates; that he neglected this duty, and in consequence of that negligence the injury arose. I ground my conclusion on the nature and extent of the obligation imposed by the statutes upon the defendants, as well as upon the allegations in the plea, and I think the judgment on the demurrer should have been in favor of the defendants.

I am unable to concur with the court below in thinking

that an agreement between plaintiff and defendants, that the latter should substitute two gates for a corresponding portion of a fence which they were bound to erect and maintain, in order to enclose their own land, and that plaintiff should see to the keeping such gates shut, is an agreement for the sale of an interest in, of, or concerning lands, so as to bring it within the Statute of Frauds.

HAGARTY, J.—It seems conceded that the Great Western Railway are not required by statute to do more than make and maintain fences, and nothing is said as to their obligation to make farm crossings or gates. I have a very strong impression that in a case like that before us, if the only obligation be to fence, and for the accommodation and convenience of plaintiff a gate is made in the fence, which, as a part of the fence sufficient, and the whole control and use of that gate is given by defendants to the plaintiff, that it is for him rather than for the railway company to attend to the opening and closing thereof, and that if he leave it open in his use of it, without any notice or knowledge on defendants' part, he at least is so far a substantial contributor to the escape of his cattle that he cannot recover.

A little common sense ought to be adhered to in these contests with railway companies. Public safety peremptorily requires the using of the most watchful care to prevent cattle or other obstructions on the track. If a gate open on a railway, used solely for the convenience of the land owner, wholly under his management and control, we must all know that it is almost impossible for any company to watch at all times if it be shut or open. The owner may keep it closed altogether, or use it every quarter of an hour for his own convenience. My own conviction is strong, that if he or his servants leave it open, and without any knowledge of defendants, his cattle escape and are killed, he is clearly either the sole cause of the loss, or such a contributor to it as will bar his recovery.

The plea demurred to is unfortunately drawn in such a way as hardly to present the point as I wish to see it raised. The allegation of duty, on behalf of plaintiff, to keep the gate

closed, is useless, as are several other allegations; still, I think, that rejecting all useless or irrelevant matter, there remains an assertion that the gate was made for plaintiff's accommodation, and accepted for such purpose by him, and he used it; that during his user he left it open, and his colts escaped and were killed by defendants' engine travelling in an ordinary manner, and driven with reasonable care, and that so the grievances happened by plaintiff's default, and not by that of defendants. We are not to enquire whether such plea does not amount to not guilty, but whether it offers a substantial bar. I think there is enough left in it, rejecting what is useless, to constitute a defence, and that the appeal must be allowed. I see no difficulty arising from the Statute of Frauds.

In addition to cases cited, I refer to *Marfell v. S. Wales* Ry. Cy. 2 L. T. N. S. 629, C. B.

Per cur.—Judgment reversed and appeal allowed.

KERR ET AL. V. PARSONS ET AL.

Promissory note—Executors—Given as such in carrying on business—Personal liability thereon.

The defendants, as executors, purchased goods of the plaintiffs, and gave notes in the following form therefor. "_____ months after date, we, as executrix and executors of the late Benjamin Parsons, promise to pay Messrs. Kerr, Brown & Co., or order, at their office in Hamilton, \$_____ value received."

<p>"Executrix and executors of B. Parsons, deceased.</p>	}	<p>(Signed) MARY PARSONS, JAMES P. STONEHOUSE, GEORGE H. PARSONS."</p>
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Held, that the defendants were personally responsible thereon.

DECLARATION contained counts on three promissory notes made by the defendants payable to the plaintiffs.

Pleas 1. *Non-fecerunt*. 2. Payment.

A verdict was taken by consent for the plaintiffs with leave to the defendants to move to enter a verdict for them or a nonsuit, depending upon the opinion of the court whether the plaintiffs could recover on the notes sued on against the defendants personally, and whether a count for goods sold and delivered ought not to have been added at the trial, it

being admitted by the defendants that the notes were given for goods sold to the defendants as executors, or upon services similar to the one, rendered since the death of the testator while the said executors were carrying on the testator's business.

The notes were put in and were all in the following form: "—months after date, we as executrix and executors of the late Benjamin Parsons, promise to pay to Messrs. Kerr, Brown, & Co., or order, at their office in Hamilton \$—— value received.

(Signed)

Executrix and executors	}	MARY PARSONS,
of		JAMES P. STONEHOUSE,
B. Parsons, deceased.		GEO. H. PARSONS.

An account was also put in headed as follows:

" Hamilton, 7th August, 1861.

" Executors of the late B. Parsons, Goderich.

Bought of Kerr, Brown & Co."

The case was argued by *Burton* for the plaintiffs, citing *Child v. Monins*, 2 B. & B. 460; *Comer v. Shew*, 3 M. & W. 350; *Wigley v. Ashton*, 3 B. & A. 101, and *Hector Cameron* for the defendants, cited *Nelson v. Serle*, 4 M. & W. 795.

DRAPER, C. J.—If the debt had accrued in the lifetime of the testator, and after his death these defendants, his executors and executrix had given these notes I should upon the authority of decided cases held them liable, as admitting assets and obtaining time to pay, the notes being payable four and five months after date; but the case is still stronger, for it appears the notes were given either for goods sold or services rendered to the defendants after the testator's death. As goods cannot be sold or services rendered to a person in a representative character, the law, from the delivery of the goods or the rendering the services at the request of the defendants, implies a personal contract on their part to pay.

The rule to enter a nonsuit or verdict for the defendant must therefore be discharged.

Per cur.—Rule discharged.

See *Child v. Monins*, 2 B. & B. 460; *Barnard v. Pumfrett* 5

Myl. & Cr. 71; Ridout v. Bristow, 1 Cr. & J. 231; King v. Thom, 1. T. R. 489; Wigley v. Ashton, 3 B. & A. 101; Corner v. Shew, 3 M. & W. 350; Nelson v. Serle, 4 M. & W. 795; referred to by the Chief Justice.

THE BANK OF UPPER CANADA V. THOMAS.

Promissory note—Maker of, surety for the endorser—Notice of after becoming the holder—Release of surety thereby.

Declaration on a promissory note made by defendant endorsed by one O. T. M. to plaintiffs.

Plea, on equitable grounds, that the defendant was surety for O. T. M., and made the note for his benefit without value, of which the plaintiffs became aware after they became the holders thereof, and after notice thereof gave time to O. T. M., and thereby released defendant. On demurrer, *Held*, bad.

The plaintiffs declared against the defendant as maker of a promissory note, payable to one O. T. M., or order, and by him endorsed to them.

The defendant pleaded on equitable grounds that he made the note as surety for O. T. M., and for his accommodation, and without value, of which the plaintiffs had notice after they became the holders, and after that notice they, without defendant's knowledge or consent gave time to O. T. M., by reason whereof the defendant was discharged. To this plea the plaintiffs demurred.

Eccles, Wm., for the demurrer, cited *Pooley v. Harradine*, 7 E. & B. 431; *City Bank v. Murdock*, 11 U. C. C. P. 138; *Davies v. Stainbank*, 6 Degex McN. & G. 679; *Greenough v. McClelland*, 6 Jur. N. S. 773 Ex.

Miller (of St. Catharines) supported the plea, citing *Pooley v. Harradine*, 7 E. & B. 431; *Perley v. Looney*, 17 U. C. Q. B. 279.

DRAPER, C. J.—I have seen no case which goes the length of deciding the question thus raised in favor of the defendant.

In *Pooley v. Harradine*, (7 E. & B. 431,) *Davies v. Stainbank*, (6 Degex McN. & G. 679,) *Rayner v. Fussey*, (28 L. J. Ex.

132; *Taylor v. Burgess*, (5 H. & N. 1,) *Ex parte* *Graham*, (5 Deg. 4 McN. & G. 356,) the *Mutual Loan-Fund Association v. Ludlow*, (5 Jur. N. S. 338,) and *Greenough v. McLelland*, (6 Jur. N. S. 773 Ex,) the precise point did not arise. It is true that in giving judgment in *Pooley v. Harradine*, *Coleridge, J.*, treats the language of *Lord Cottenham* in *Hollier v. Eyre*, (9 Cl. & F. 1 and 45,) as importing that knowledge on the part of the creditor when he deals with the principal, and not when he first acquires his own rights, operates to make such dealing a discharge of the surety; and the further remarks of *Coleridge, J.*, after referring to the case of *Davies v. Stainbank*, seems strongly to support the contention on the part of the present defendant. But the point did not come up for decision in *Pooley v. Harradine*, and I understand *Knight Bruce, L. J.*, to decide expressly in *Davies v. Stainbank*, that the evidence shewed that when the Messrs. *Stainbank* took the bills in that case, they knew that the relation of principal and surety existed between the *Davies*'. And again, the language used in *Greenough v. McClelland* is, it appears to me, carefully and designedly limited to an approval of *Pooley v. Harradine* to this extent only, that knowledge of the principal and surety at the time when the holder received the notes, and the subsequently giving time to the principal, discharges the surety; in other words, they approved of the decision, and avoided going beyond it.

Under ordinary circumstances, *i. e.*, without any thing *dehors* the instrument, the endorsee of a bill or note may deal with all the parties according to their legal liabilities as drawers, makers, endorsers or acceptors, as he deems best for his own interests. The cases above referred to decide, that if any of these parties are sureties for others, and the holder takes the bill or note with that knowledge, he must consider the interests of the surety in addition or lose recourse against him. It will hardly be denied that the two positions widely differ, and that if the doctrine contended for in the present case be sound, he advances his money under one known state of facts, and may afterwards find his rights qualified by an additional fact subsequently notified to him. The contract with him by each of the parties, resulting

from their position in regard to the bill or note, would therefore in fact be altered by a matter unknown to the holder when he acquires it for value. Whether to hold that the equitable doctrine in relation to sureties extend to such a case would not tend injuriously to affect the negotiability of such instruments, by enabling a party by parole evidence to free himself from the liability created by the writing, as against one who became holder without notice, and whether that consideration is not sufficient to restrain the courts going beyond the point which actual decisions have reached, is a question which I shall leave for wiser heads than mine to determine. But I will not lead the way to such a conclusion, nor go beyond the cases I have referred to; even though there are *dicta* strongly leading to that result. It is one thing to hold a man bound by the legal or equitable consequences of facts known to him when he enters into any arrangement, and another to make known to him facts existing, but not communicated to him till after he has changed his position, as by advancing his money, and thus to qualify his rights or to impose some unexpected restraint upon his action in respect to them.

I therefore think the plaintiffs should have judgment.

HAGARTY, J.—I gather from the language of Sir J. Coleridge, in delivering the judgment in *Pooley v. Harradine*, that he considers that courts of equity would probably relieve the surety, if the creditor give time to the principal debtor after knowledge of the existence of the relation, although he had no such knowledge at the date of the original transaction. And the inclination of my mind is to think that such would be the view taken. And this on the short ground that in the language of the case referred to "the defence does not arise by any alteration of the original contract, but that the creditor cannot fairly or equitably sue the surety when, knowing of the existence of the relation of principal and surety, he has voluntarily tied up his hands from proceeding against the principal."

Regretting, as I do, that the courts either of law or equity have ever (at all events, as to third persons) recognised

any different position or relation between parties to written instruments, than those which they have themselves assumed on the face of these instruments; I am not willing, in the absence of some express decision, to go a step further than Pooley and Harradine on the facts of that much-discussed case. I cannot understand why a man who voluntarily assumes the position of maker of a note or acceptor of a bill should be heard either at law or in equity, requiring other persons with notice or otherwise, to adopt any different course of dealing towards him than that to which he is entitled by his legal position on negotiable paper.

Accommodation transactions do not merit any special departure from the rules of law, and in my humble judgment, if a man for reasons satisfactory to himself chooses to assume a false position as a principal debtor when he is only a surety, it would conduce much more to ensuring reality and truthfulness in dealings with negotiable paper, strictly to hold him always to the position in which his own act has placed him: as between him and the person to whom he directly lends his name with a view to assist or accommodate, the law affords ample protection.

If the law be as contended for by the defendant here, I prefer leaving it to the Court of Appeal, so to decide on this most important subject.

Per cur.—Judgment for plaintiffs.

HAIGHT, DEFENDANT, (APPELLANT,) v. MCINNIS, PLAINTIFF,
(RESPONDENT.)

Chattel mortgage—Registry of—Operation of, by registry to date.

Held, that the registry of a chattel mortgage does not cause it to operate and have relation back to its date, therefore a writ placed in the sheriff's hands between its date and registry takes precedence of it. The decision of this court in *Feehan v. The Bank of Toronto* (Vol. 10) affirmed.

APPEAL from the County Court of the County of Elgin.

Interpleader action to try whether certain goods seized and taken in execution by the sheriff of the county of Elgin—under a writ of *feri facias*, tested the 14th of July, 1860, and issued out of the county court of the county of Elgin,

directed to the said sheriff, and delivered to him on the 29th of August, 1860, for the having an execution of a judgment of that court recovered by the said James Haight, in an action at his suit against John Stephen—were at the time of the delivery of the said writ to the said sheriff to be executed the property of the said Donald McInnes as against the said James Haight.

The following evidence was given at the trial of the cause material to the issue :

Peter Murtagh, sworn.—I am clerk of the county court; I produce an assignment from John Stephen to Donald McInnes, dated the 28th of April, 1860; it was filed at the opening of the office on the 30th of August, at eleven o'clock.

Donald McInnes, sworn.—I was in the employment of the plaintiff on the 28th of August last; I left Hamilton on that day and, reached London that night. I left London by train for St. Thomas about eight o'clock. I took my breakfast at Thompson's Hotel, and after breakfast I went immediately to the store; it was about 9 o'clock a.m. I came up to take possession; I knew Stephen had made an assignment, and I knew I had come to take possession; it was intended that Mr. Thompson, another clerk, should come, but he got a telegram to go to St. Catharines. When I got to the store I found John Stephen's brother there. I took possession, and got the key of the safe. I remained in possession afterwards, and John Stephen exercised no acts of ownership over the goods after that. I satisfied the Bank of Montreal's execution. I did not endeavor to conceal the fact of the assignment, but I was blamed at the time for publishing.

Cross-examined.—I believe I told Mr. McKenzie, and John Stephen's brother, — Stephen told me if I had not spoken of it the execution would not have been pushed on; at the time the sheriff seized under the execution of Haight, no one knew from me of the assignment. I did not take down the sign. I made no alteration to shew that an assignment had taken place. Mr. Stephen remained at Hamilton; we went together to Hamilton; we left here Monday morn-

ing by first train; I returned to the store just as usual. I took possession of the safe; young Stephen slept in the store, and he kept the key to get in. I had had possession of the safe before I went to Hamilton, under Stephen before the assignment. I took no other possession than that; I had had possession of the store, and goods before the store; I did not tell any one that I took possession when I came up after the assignment. I was not instructed to keep it a secret, I did not in as far as I know, that I was not in possession of the assignment; I did not know at the time of the assignment there was an execution in the sheriff's hands of the Bank of Montreal against J. Stephen; I paid it off afterwards.

Re-examined.—There were no debts contracted by Stephen with the public after the assignment; up to the time of the assignment Stephen was there. After the assignment he took no further interest or control. I got to the store on the morning of the 29th, at 9 a.m. (It was agreed that the claim to the household furniture by the plaintiff should be abandoned.)

Colin Munro, sheriff, sworn.—I have an execution in my hands, *Haight v. Stephen*; it was issued the 14th of July last, and placed in my hands on the 29th of August, 1860. I think it was on the following morning I made a seizure under it. I went into the store and took possession of the goods under it. Mr. Stephen, the brother of John Stephen, was in the store; it was some time before half-past nine o'clock that I went in with the execution, and while I was there I received the execution in Benedict's suit. Mr. McInnes was there either when I went in or afterwards. I asked him about the goods; if he was in the possession of the goods; he said he was not in possession for McInnes, nor for Stephen, but there was a man coming up who would be in possession. I then seized, and got Mr. McInnes to take charge for me, and he agreed to take possession as my agent; he said he did not know how soon he would leave, but when he did leave he would deliver the key to me. I had a previous execution at the suit of the Bank of Montreal against J. Stephen, which I received on the 16th of July. I went into the store, told Mr. Stephen I had such execution, and

he must consider the goods were under seizure by me until it was paid; and I consider Mr. Stephen in charge of the goods under me, under the Bank of Montreal's execution, and that was not paid off until some time after the assignment to McInnes. I sold the household furniture under an execution of the Bank of Montreal; there was some surplus after satisfying that execution. Mr. McInnes claimed all the rest after the Bank of Montreal's execution was paid. I think the furniture brought some \$30 of a balance after satisfying the Bank of Montreal's execution, which I paid McInnes; I did not give Mr. McInnes any warrant; I merely constituted him my agent or officer verbally.

The jury, upon the learned judges charge, in the court below, having found for the plaintiff, and the court upon motion to set verdict aside having discharged the rule, the defendant appealed therefrom upon the following ground: that the learned judge should have told the jury that the *fi. fa.* took precedence of the assignment.

The appeal was argued by *Crombie*, for Haight, citing *Feehan v. The Bank of Toronto*, 10 U. C. C. P. 32.

Burton, for McInnes, referred to *Marples v. Hartley*, 3 L. T. N. S. 774.

RICHARDS, J.—This case, as far as this court is concerned, turns on this simple point: if we uphold our own judgment in *Feehan v. The Bank of Toronto*, (10 U. C. C. P. 32,) then the decision in the court below must be reversed. Taking secs. 1 & 3 of the Consolidated Statutes, ch. 45, by themselves alone, they would well warrant the conclusion that the registry of the assignment at any time within five days allowed by the act would make it valid from the beginning, and would therefore cut out any execution delivered to the sheriff within the five days.

In deciding what was the intention of the legislature we must look at the whole course of legislation on the subject—to the repealed acts as well as those now in force. The act of 12 Vic., ch. 74, declared these conveyances void against execution creditors, &c., unless registered. No time was

fixed for the registry, and the courts held, that if registered before an execution was placed in the sheriff's hands against the goods of the assignor, the assignment would still be valid. I do not think that there can be any doubt that under that statute, if the sheriff received an execution against goods, which, if the owner had not given a mortgage on them, would have been liable to be seized under the writ, they would be held so liable if the mortgagee had not registered his mortgage until after the sheriff had levied on and taken possession of the goods. Such a view would be quite consistent with the intention of the legislature, that the mortgage should be *void* unless registered. Not being registered, until a new right attached by the placing the execution in the sheriff's hands it would be void as to such creditor. Then did the legislature by the act of 20 Vic. ch. 3, intend to give to the holders of these bills of sale and mortgages, any advantages they had not previously possessed, they had before them the experience of several years and the decisions of the courts. The whole scope of that act, so far from facilitating the taking security on or the transfer of property by means of these instruments, was intended to render it more difficult. They were undoubtedly viewed with disfavour by the legislature. I cannot therefore come to the conclusion that by requiring it to be registered within five days from the execution thereof, they intended to give an advantage to the holder of such an instrument over what he had before, but rather being void during that period against creditors having executions lodged in the sheriff's hands, they intended to make it *absolutely null and void* against creditors, if it was not registered within the five days mentioned, though it might be registered afterwards. In this view I think the judgment of this court in *Feehan v. The Bank of Toronto* correct. I cannot say that I am free from doubt, but I think this view best accords with the intention of the legislature. In the judgment of the Court of Queen's Bench, in a suit between the same parties, that court arrives at a different conclusion; and assuming that the legislature intended that these instruments should be valid from the beginning, and should only be void after the five days, and if

they were then registered, that they should be valid thenceforward, their judgment is correct, I have not been able to bring my mind to this conclusion.

In my opinion the judgment of the court below should be reversed and the appeal allowed. I do not think *Marples v. Hartley*, (3 L. T. N. S. Q. B., 774,) makes any difference, that being undoubtedly in accordance with the English act, and with the view I should probably take of our consolidated statute, if we had had no previous legislation on the subject.

This being a case in appeal we are bound to decide according to our own view of the law, notwithstanding the judgment of the case in the Court of Queen's Bench

Per cur.—Appeal allowed.

DEVLIN V. BAIN.

Driving—Travellers overtaking others—Consol. Stat. U. C., ch. 56, sec. 2 & 3.

Upon an action brought for damages occasioned by a traveller not turning out when overtaken on a public highway, *Held*, that under sections 2 & 3 of ch. 56, Consol. Stat., U. C., the learned judge should leave it to the jury to decide whether the damage was occasioned by the misconduct of the defendant, or partly by the default of the plaintiff as he in this case, not being able to turn out, did not stop as required by the statute.

PLAINTIFF, in the first count of his declaration, alleged, that he and defendant were each driving their horses and sleighs along the same highway, the defendant driving behind plaintiff, at a part of the highway where it was impossible for one sleigh safely, or without a collision, to pass the other, or to turn out of the way to allow the other to pass, as defendant well knew. Yet defendant, intending to hurt plaintiff, violently and unlawfully and without notifying his intention to plaintiff, who was lawfully driving his sleigh in front of defendant, endeavored to pass the sleigh and horses of the plaintiff at the same point on the highway, and then so violently, unskillfully and improperly conducted himself, that in so driving past the plaintiff, the sleigh and horses of defendant were driven with great violence against the plaintiff, and his sleigh and horses; and plaintiff having no notice of defendant's intention so to do, and being unable to avoid

the said collision, was thereby thrown and bruised and crushed, and one of his legs broken.

Second count.—For that the defendant so violently, negligently, and unskillfully drove and managed a sleigh and horses on a public highway, that the same were forced and driven with great violence against the plaintiff, and against his sleigh and horses, which he was then driving on the highway, whereby the sleigh and horses of the plaintiff were much broken and damaged, and thereby the plaintiff, who was driving his said sleigh and horses along the said highway, was unable to avoid the said collision so caused by the negligent and improper conduct of defendant, was then thrown down and bruised and crushed between the said two sleighs, and one of plaintiff's legs was thereby broken.

Plea, not guilty.

The cause was taken down to trial at the last fall assizes for the united counties of York and Peel, for 1861, before the Chief Justice of this court.

It appeared that plaintiff and defendant in February last were both coming along the plank road of the third concession of York. The defendant was drawing a load of hay, and plaintiff a load of stone; both were proceeding in the same direction. Plaintiff's team was so close to the side of the road that he could not turn out; defendant in turning out to pass plaintiff's sleigh and horses, shoved them off into the ditch and plaintiff's leg was broken. For defendant it was contended that under ch. 56, sec. 3, of Consol. Stats. of U. C., plaintiff should be nonsuited; that it was his duty to stop when he found that defendant was desirous of passing him. The learned Chief Justice refused to nonsuit. The defendant called witnesses and they gave evidence: that when the defendant was about to pass the plaintiff's team they increased their speed, and if plaintiff had stopped his team or turned out the accident might have been avoided. The jury were told that there seemed no doubt that defendant was travelling at a greater speed than plaintiff; but were asked to say whether the plaintiff, by reason of the extreme weight of his load, found it impracticable to turn out, or whether his not turning out arose from the ditch being so near that he

could turn out no further; that under the statute it was the duty of the plaintiff to stop when defendant was coming up at the greater speed. They were further told that if the extreme weight of the load on plaintiff's vehicle made it impracticable for him to turn out, they were so to find. If they found for plaintiff on the other points, defendant had leave to move to enter a verdict for him. They were further asked if defendant drove his horses so as to run against plaintiff's horses or himself, so as to do him an injury, and the amount of the damages.

The jury found for the plaintiff, with £60 damages, and said that plaintiff could not turn out by reason of the depth of the snow on the track, and from the weight of his load.

In Michaelmas Term last, *James Boulton* moved, in pursuance of the leave reserved, to enter a verdict for defendant, or for a new trial, the verdict being contrary to law, evidence and the judge's charge.

R. A. Harrison shewed cause, and contended that under the facts proven the case was not brought within the provisions of Consol. Stats. of U. C. ch. 56, secs. 2 and 3; and if it was, plaintiff, by non-compliance with this statute, only forfeited the penalty imposed under section 11; and the statute did not interfere with his right to recover in this action. He further contended that, under the evidence plaintiff ought to recover, as his alleged negligence in disobeying the statute did not in any way contribute to the accident. Citing *Greenland v. Chaplin*, 5 Ex. 243.

James Boulton, in supporting the rule, cited Consol. Stat. U. C., ch., 56, p. 687.

RICHARDS, J.—Section 2, of Consol. Stats. of U.C., ch. 56, provides in case any person travelling on any highway, in charge of any vehicle, be overtaken by any vehicle travelling at greater speed, the person so overtaken shall quietly turn out to the right, and allow the said vehicle to pass. Section 3. In case of one vehicle being overtaken by another, if by reason of the extreme weight of the load on the vehicle so overtaken, the driver finds it impracticable to

the said collision, was thereby thrown and bruised and crushed, and one of his legs broken.

Second count.—For that the defendant so violently, negligently, and unskillfully drove and managed a sleigh and horses on a public highway, that the same were forced and driven with great violence against the plaintiff, and against his sleigh and horses, which he was then driving on the highway, whereby the sleigh and horses of the plaintiff were much broken and damaged, and thereby the plaintiff, who was driving his said sleigh and horses along the said highway, was unable to avoid the said collision so caused by the negligent and improper conduct of defendant, was then thrown down and bruised and crushed between the said two sleighs, and one of plaintiff's legs was thereby broken.

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could turn out no further; that under the statute it was the duty of the plaintiff to stop when defendant was coming up at the greater speed. They were further told that if the extreme weight of the load on plaintiff's vehicle made it impracticable for him to turn out, they were so to find. If they found for plaintiff on the other points, defendant had leave to move to enter a verdict for him. They were further asked if defendant drove his horses so as to run against plaintiff's horses or himself, so as to do him an injury, and the amount of the damages.

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turn out as aforesaid, he shall immediately stop, and if necessary, for the safety of the other vehicle, and if required so to do, he shall assist the person in charge thereof to pass without damage.

Now the jury have found for the plaintiff, but at the same time have also found that he did not turn out as required by the statute, because of the depth of the snow and the weight of his load. Then, according to the statute he ought to have stopped.

It does not appear from his lordship's notes, that he left it to the jury to say whether the plaintiff by his negligence contributed to the accident, or whether it was caused by the improper conduct of the defendant. Under all the circumstances of this case, we think there ought to be a new trial.

The finding of the jury seems inconsistent and unsatisfactory on the points submitted. We think the opinion of the jury on a new trial, in addition to the questions submitted on the former trial, should be taken, whether the injury to plaintiff was caused by the improper conduct of the defendant, or was contributed to by the act of the plaintiff in not turning out or stopping his horses, see *Tuff v. Warman* in Ex. ch., 5 C. B. N. S. 573. As neither party seems to have called the attention of the presiding judge to this point, and it is probable the new trial is rendered necessary in consequence, the rule for a new trial will be absolute, costs to abide the event.

Per cur.—Rule absolute.

HEALEY V. CRUMMER.

Seduction—Action commenced by father during lifetime—Survival of to mother—Pleading—Statute.

The plaintiff sued for the seduction of her daughter, claiming the right to continue the action upon a writ issued by the father, in his lifetime, and declared for loss of service as between mistress and servant. The seduction, it was proved, took place and a child was born while the daughter resided with her parents, and during her father's lifetime.

Held, 1st. That the right of action did not survive to the mother.

2nd. That it was necessary (the case not coming within our statute) to allege and prove the relation of master and servant, and the loss of service occasioned thereby.

DECLARATION, for the seduction of Ellen Margaret Healey, "being the daughter and servant of the plaintiff," *per quod*, &c.

Plea, not guilty.

At the trial, at the London assizes, in October last, before Sir J. B. Robinson, C. J., it was sworn that the seduction took place in November, 1860; that the witness was then living with her father and mother, the latter being the plaintiff in this action. A child, the fruit of the illicit intercourse, was born on the 1st of September, 1861, when her father was still living, and he commenced an action against the defendant for this wrong, and a writ was sued out, but the father died before it was served. It was objected, that, under these circumstances the plaintiff could not recover. The learned Chief Justice allowed the case to go to the jury, reserving leave to the defendant to move to enter a nonsuit, and the jury found for the plaintiff.

In Michaelmas Term *M. C. Cameron* obtained a rule *nisi* on the leave reserved.

Becher, Q. C., shewed cause, referring to *Cross v. Goodman*, 20 U. C. 242.

M. C. Cameron, contra, cited *Lake v. Bemiss*, 4 C. P. U. C. 430.

DRAPER, C. J.—I do not think the Consolidated Statutes of U. C., ch. 77, affect this case at all.

By the first section of that act, the father, or in case of his death, the mother of any unmarried female who has been seduced, "and for whose seduction the father or mother

could sustain an action, in case such unmarried female were at the time dwelling under his or her protection, may maintain an action for the seduction, notwithstanding such unmarried female was at the time of her seduction serving or residing with another person, upon hire or otherwise."

Such was not the case here. The daughter was at the time living in her father's house, or, in the words of the statute, "dwelling under his protection," and he did not require the aid of the statute to bring the action. The daughter was confined during her father's life, so there was seduction followed by the birth of a child, while the daughter formed part of her father's family. The cause of action therefore was vested in him, and he caused a suit to be commenced, and a writ was sued out, but not served.

If the cause of action thus vested survived, it would not survive to the present plaintiff, his widow. If it did not survive, there is not a word in the statute to give the present plaintiff a right of action under the circumstances appearing.

The rule must be absolute to enter a nonsuit, unless the pleadings make a difference, and a consideration of what has been determined by our courts under the statute is unavoidable.

The declaration is in the common form. In *McLean v. Ainslie*, (6 U. C. Q. B. O. S. 456,) the court decided that it was unnecessary in an action by the parent, founded on the first section, to aver in the declaration that the action was brought under the statute, and in *L'Esperance v. Duchene*, (7 U. C. Q. B. 146,) it is said, "a declaration which would not be held in England to contain a sufficient statement of a cause of action for seduction in England must be held to be insufficient here." The plaintiff is right therefore in declaring as in England, where the right to recover, if the action be case, requires averments of the relation of master and servant, and of the loss of service, the claim to damages resting upon proof of the latter averment. "The legislature have left the action to rest upon its former foundation in point of form," *McLeod v. McLeod*, (9 Q. B. U. C. 331.)

It is obvious on reading the evidence, that the defendant could not deny the relation of parent and child to exist

between the plaintiff, and the girl seduced by him. Neither, according to *McLeod v. McLeod*, can he plead that the daughter was not at any or either of the several times, when, &c., the servant of the plaintiff, for in that case it was adjudged, and I think rightly, if previous cases had been rightly adjudged, that such a plea denies what in all cases, where an unmarried daughter is seduced, is now by the statute established as an inference of law not be controverted.

That decision however rests wholly upon the statute, and if the second section extended only to those actions which the parent could not have maintained but for the enabling provisions of the first, it would not have prevented such a plea in this case. But the decisions in *McLean v. Ainslie*, and the passage cited from *L'Esperance v. Duchene* uphold the common form of declaration in all cases brought by the parent, whether at common law or under our statute, and then *McLeod v. McLeod* decides that such a plea is inadmissible.

If the facts which are proved were specially pleaded, the defence would still resolve itself into this, that the daughter was not at the several times, when, &c., the servant of the plaintiff, and that the plaintiff had sustained no loss of service. The defendant would in reality be pleading evidence which would establish that the daughter was not the plaintiff's servant.

The case of *Cross v. Goodman*, 20 Q. B. U. C. 242, was referred to, but the circumstances were wholly different, and the decision does not appear to me to touch the present case.

I do not very well see therefore how, consistently with the authorities referred to, the defendant could traverse the material allegation that the daughter was the plaintiff's servant, nor yet, if he confessed it, how he could avoid the consequence. If so, then, as appears to me, we must necessarily hold that the doctrine in *Torrence v. Gibbins* (5 Q. B. 297) is by reason of our statute inapplicable, as the doctrine in *Grinnell v. Wells*, (7 M. & Gr. 1033,) and in *Davies v. Williams*, 11 Jur. 750, certainly is.

Without absolutely deciding that the defendant had a right to raise this question, and give the necessary evidence

for that purpose under a plea of not guilty, (though such is my present inclination,) I think the plaintiff should not be allowed to succeed on the ground that there was no fitting plea, when no such objection was raised at the trial, and when the facts on which the defence rests were either admitted or were proved by the plaintiff's own witnesses. Nor in fact did the plaintiff's counsel suggest during the argument any doubt upon this point. Attention was drawn to it by one of the court.

Concluding then, that the facts are properly before us, I am of opinion that the plaintiff is not entitled to recover, and that the rule should be made absolute.

Per cur.—Rule absolute

PATTERSON V. THOMAS, SHERIFF.

Sheriff—Fi. fa. lands—False return.

A sheriff having made a return to a writ of *fi. facias* lands, "lands on hand for want of buyers," and having subsequently, under a writ of *venditioni exponas* in the same suit, sold the lands under a binding contract, on which writ of *venditioni exponas* he made a return of "no lands;" a plea on equitable grounds to a declaration against him for a false return, that the plaintiff misrepresented to the sheriff that the lands levied on were the lands of the execution debtor; *held*, to be no answer to the action.

This was an action for a false return. The declaration showed that a judgment had been recovered against B. W. Sharp, and A. E. C. Sharp, his wife, that a *fi. fa.* against lands issued, to which the sheriff, the defendant, returned lands to the value of 1*l.* on hand for want of buyers, whereupon a writ of *venditioni exponas* was sued out and delivered to the defendant, by virtue of which writ the defendant exposed for sale the lands by him taken under the *fi. fa.*, and by a binding contract sold the same to one J. J. for the amount endorsed on the *ven. ex.*, and afterwards falsely returned that the said (the execution defendants) had not any lands in his county whereof he could cause to be levied, &c.

Plea, on equitable grounds, set out that one J. C. made a will, directing all his debts to be paid; that his wife [one of the judgment debtors] should have one-half his real and

personal estate in lieu of dower; that his two sons should have the residue, and he appointed his wife executrix of the will and guardian to the children who were minors, with power to the executrix to sell any portion of the real estate devised to the sons, which she might deem fit for their interest to be sold, or which might be necessary for their maintenance and education. That testator died indebted to various persons. That before plaintiff recovered his judgment, the widow (the female defendant) sold and conveyed a portion of testator's real estate and received the proceeds to her own use. That she afterwards married Sharpe; that afterwards, and before the issuing of any execution against Sharpe and his wife, they instituted a suit in Chancery against the testator's sons, concerning the premises for partition, and before the issuing of the execution in the declaration mentioned it was decreed, that the part of the testator's real estate sold by his executrix should be assigned to her as her portion, another portion to the sons of the testator, and the residue (sufficient for the purpose) to be sold and the proceeds applied towards payment of the testator's debts, &c., and thereupon plaintiff misrepresenting to defendant that the lands of testator so devised, partitioned and disposed of by the deviser, were the lands of Sharpe and his wife liable to satisfy the judgment, and defendant relying on that misrepresentation did attempt to levy on the lands as if they belonged to Sharpe and his wife, and offered them as such for sale, and upon the final offering them for sale, the said J. J. in ignorance of the truth, and deceived by the said misrepresentations and other misrepresentations of plaintiff to himself, became the highest bidder and entered into a contract in writing, by which he acknowledged to have purchased the right of Sharpe and his wife on a sale on a writ of *ven. ex.* for \$666.33, and he agreed to complete the purchase, or on failure to forfeit the deposit and pay the loss and charges of a resale, all which was done with the privity and consent of plaintiff. That before any more could be or was done by defendant, J. J. discovered his mistake and the said misrepresentations and repudiated his purchase, and refused, on defendant's request, to complete it, and thereupon defendant discov-

ered as the fact is, that the lands seized by him were not the lands of Sharpe and his wife, or either of them, and were not liable to satisfy their debt to plaintiff; "and that the defendant was induced by fraud and misrepresentation of plaintiff to become such alleged purchaser, and by reason of the premises the defendant could not enforce such alleged contract against J. J., wherefore he did return to the last of the executions that Sharpe and his wife had no lands.

Burton supported the demurrer, and contended that the defendant could get relief from a court of law, and equity would not interfere in such a case, *Clapham v. Shillito* 7 Beav. 146.

Richard Martin, contra, cited *Morgan v. Brydges*, 2 Starkie 314; *Brydges v. Walford*, 6 M. & S. 42; *Levey v. Hale*, 29 L. J. C. P. 127; *Barker v. St. Quintin*, 12 M. & W. 441.

DRAPER, C. J.—The nearest case to the present I have seen is *Brydges v. Walford*, (6 M. & S. 42,) where the sheriff had returned goods on hand for want of buyers, and a *ven. ex.* issued, on which the sheriff sold part. An action was brought against him for not selling the residue, and not paying over the money he had made; and at the trial he was allowed to prove that the execution debtor became bankrupt before the judgment, and that the plaintiff had notice of the insolvency at the time the *fi. fa.* was issued. In that case, however, the return was in a qualified sense true when it was made, for the debtor had then a title in the goods which was defeated by the commission of bankruptcy, and its effect by relation to the act of bankruptcy, and the court alluded to the fact that if the plaintiff had received the money he must have refunded it to the assignees. I think this plea is no answer.

HAGARTY, J.—I think the plea bad on the short ground that the sheriff has filed on record his return of lands on hand, and he here admits a return to the *ven. ex.* and *fi. fa.* residue, no lands, as charged in declaration, and if the plea is held good it must be on the ground that it discloses causes

for a perpetual injunction against plaintiff, who would thus be barred as against the sheriff, instead of the latter being obliged to take the course of moving to amend his return and proceeding. If this plea is held good the sheriff need do nothing, and the plaintiff will be without remedy, or be forced to apply to the court to compel the sheriff to amend his return if he could be. This is conceding to defendant, for argument sake, that he is not bound to take any steps against Judd. A deposit seems to have been paid, no statement is made as to what became of it.

It is most difficult to understand this plea, especially that part professing to set out the decree of the Court of Chancery assigning the land sold by Mrs. Sharpe as her portion; another portion to the sons as their share, and the residue to be sold to pay Chamberlain's debts, and the equity costs, with an averment that such portion so to be sold was sufficient for such purpose.

It is averred to be sufficient. If more than sufficient, the surplus would, I presume, according to the terms of the devise, be available for division between Mrs. Sharpe and the children, unless the allegations that the portions she had already sold were more than equal to her one-half share. I can hardly understand the court of equity absolutely appropriating her share, and another to the sons, and the residue to be sold for debts, and without provision for the surplus, if any.

It is somewhat mortifying to be thus obliged to spend time in discussing the effect of a decree in equity alleged to have been made before the issuing of any of the writs of execution, when on the recent trial of this cause it appeared that the decree in question was not made till some months after the sheriff's sale to Judd.

Per cur.—Judgment for plaintiff.

MOORE ET AL. V. McLAREN.

Railway company—Calls—Mode of making—Invalid when more than one made upon same day—Assignment—Valid when first call thus made has been paid—Insolvency of assignee.

The calls upon stock in a railway company cannot be made at less intervals than two months. Where the directors of a company at one meeting made several calls, payable at intervals of two months from each other,

Held, that a stockholder who had paid the first call thus made, and then assigned his shares, was not responsible for the subsequent calls thus illegally made.

Held, also, that the insolvency of the assignee of the stock was no ground for vitiating the assignment; the only condition precedent for the valid assignment of stock being the payment of all calls.

The declaration stated that on the 2nd of July, 1860, the plaintiffs recovered judgment against the Hamilton & Port Dover Railway Company in the Court of Common Pleas, Upper Canada, for £12,500 with £7 12s. for costs of suit, on which they sued out a *fi. fa.* against the goods of the said company, directed to the sheriff of Wentworth, to which writ the sheriff returned *nulla bona*, and the moneys so recovered by the judgment remain unsatisfied to the plaintiffs; that the Hamilton & Port Dover Railway Company were incorporated by 16 Vic., ch. 102, and certain clauses of the railway consolidation act therein mentioned; that after the passing of the act, *i. e.*, 1st January, 1855, defendant and others respectively subscribed for sundry shares in the capital stock of the said company, and the defendant subscribed for and became the holder and proprietor of 40 shares of £25 each, and hath ever since continued to be and still is a shareholder, and the defendant at the time of subscribing paid £5 per cent. on each share, and while the defendant was the proprietor of the said forty shares, the directors of the said railway company, according to the said act, made a call of five per cent. which call was duly paid by the defendant; and afterwards, to wit, on the 3rd November, 1856, made four other calls of ten per cent. each on each share, and appointed the same to be paid on certain days, which calls were afterwards duly paid; and on the 23rd October, 1858, the defendant still being the holder of the 40 shares, the directors made five other calls of ten per cent. each, and appointed the same to be paid to the company as follows: the first

on the 25th November, 1858; the second on the 27th January, 1859; the third on the 31st March, 1859; the fourth on the 2nd June, 1859, and the fifth on the 4th August, 1859

Averment of due notice in the Canada Gazette of such calls; that the defendant paid the first of these calls, but did not pay the other four, but that they remain wholly unpaid; by reason whereof the defendant became liable to pay interest thereon; that the said four calls and interest amounted to £480, all which is still unpaid by the defendant; by reason whereof, and by force of the said acts, an action hath accrued to the plaintiffs to demand and have a sum equal to the amount so due by the defendant in respect of the said forty shares.

Pleas 1.—Never indebted.

2. Defendant was not at the recovery of the judgment or at the commencement of the suit a stockholder.

3. That the last five calls were all made on one day, *i. e.*, 23rd October, 1858, payable as in the declaration mentioned: that defendant duly paid the first of these calls, and afterwards, and before any other call was made or payable, and before the commencement of this suit, duly assigned the said 40 shares to one A. H., who accepted the same, and thereupon became, and since hath been, and still is, proprietor thereof, subject to the conditions on which the defendant held the same; that plaintiffs well know that defendant was original proprietor of, and transferred said shares to A. H. That after such transfer, and before the commencement of this suit plaintiffs having obtained their said judgment, and being judgment creditors of the H. & P. D. Railway Company, within the meaning of the Common Law Procedure Act, made an *ex parte* application to a judge, stating upon affidavit the recovery of the judgment, and that it was unsatisfied, and that the said A. H. was indebted to the said Railway Company, in respect of the identical four calls in the declaration mentioned, and thereupon the judge granted an attaching order that A. H. should appear before the judge to shew cause why he should not pay the said debt to plaintiffs, and A. H. disputed the debt, whereupon an issue was

tried, and a verdict obtained thereon by plaintiffs, and judgment entered thereon, and execution issued against the goods of H. And that these proceedings were taken for the same identical calls claimed from defendant in respect of the same identical 40 shares, *et hoc par.*, &c.

Replication took issue on the 1st plea. To 2nd, that by the act of incorporation of the said railway company, certain clauses of the Railway Clauses Consolidation Act are incorporated, which enact, that no shares are transferrable until all previous calls are paid in, or the shares are declared forfeited. That defendant took the stock long before the making of the calls, and when the last five calls were made, defendant was a director of the company, and acted as such director, and long after the making of the said five calls paid one of them; and long after the making of the said five calls, and before payment, and in collusion with the said A. H., then an insolvent, as defendant well knew, for the purpose of fraudulently evading payment of the residue, and without consideration, signed a paper writing purporting to sell and transfer to A. H. the said forty shares, and defendant never executed any other writing transferring the said shares, nor hath any valid transfer been made thereof by defendant, nor have the shares been declared forfeited for the non-payment of calls; that nothing passed by the said paper writing, and that as between plaintiffs and defendant, defendant is still holder of the said 40 shares.

To 3rd plea, stating the act of incorporation, and the incorporation of certain clauses of Railway Clauses Consolidation Act, as before, and that defendant subscribed for 40 shares, and had been a director, and paid the first of the last mentioned five calls. That the supposed assignment to A. H. was made in fraud of the other creditors and shareholders of the company, and without consideration, and in collusion with A. H., for the purpose of fraudulently evading payment of the residue of the five calls, A. H. being, as defendant well knew, insolvent, by reason whereof the alleged transfer was wholly void, and defendant did not duly assign and transfer to A. H., nor did A. H. accept the said 40 shares.

Demurrer to 3rd plea.

Rejoinder, taking issue on replication to 2nd and 3rd pleas, and demurrers to replication to 3rd plea.

The clauses of the Railway Clauses Consolidation Act, (Consolidated Statutes of Canada, ch. 66,) seem to be:

Section 48. The directors may from time to time make such calls of money upon the respective shareholders, in respect of the amount of capital subscribed or owing by them, *as they deem necessary*, and 30 days' notice at the least shall be given of each call, and no call shall exceed the prescribed amount determined in the special act, *or be made at less interval than two months from the previous call.*

Section 73. The stock of the company shall be deemed personal estate, but no shares shall be transferable until all previous calls thereon have been fully paid in, or the said shares have been declared forfeited for the non-payment of calls thereon.

These clauses, with others, are incorporated in the special act, 16 Vic., ch. 102, which by sec. 10 limits the calls to ten per cent. on the shares.

By section 80 of the Railway Act, every shareholder shall be individually liable to the creditors of the company, to an amount equal to the amount unpaid on the stock held by him, for the debts and liabilities thereof, and until the whole amount of his stock has been paid up.

O'Reilly, Q. C., for plaintiffs as to estoppel, cited *Stratford, &c., Railway Company v. Stratten*, 2 B. & Ad. 518. He contended that the bringing an ineffectual suit against another party, is not an estoppel in an action against the party properly liable subsequently brought.

Burton for the defendant.

DRAPER, C. J.—It has, among other objections taken to the plaintiffs' right to recover, been urged that the venue is wrongly laid in the county of Wentworth, because the action is founded on the judgment recovered by the plaintiffs against the railway company, and that the venue is consequently local, and must be laid where the record is. *Mr. Burton* did not appear to place much reliance on this objec-

tion, and I shall content myself with saying, that if the defence rested on this point, I should have no difficulty in deciding against it.

As it stands admitted on the pleadings before us on this demurrer, that the defendant was at one time a shareholder, he must relieve himself from that character in order to defeat this action. And as it appears that, as a *fact*, there were four calls made, when he made the transfer of his shares which he relies upon, he has to meet the difficulty, that by the act no shares are transferable until all previous calls thereon have been fully paid. In order to do this, he seeks to avoid these four calls as made contrary to the true intent and meaning of the statute, and that consequently they do not affect the validity of the transfer, which, the plaintiffs, on the other hand, do not deny, has in fact been made as the defendant represents. With this view, the defendant sets up that on the 23rd of October, 1858, the directors of the company made five calls, each of ten per cent., (being the largest sum they could demand in one call,) allowing the necessary period of two months for the payment of the first, and allowing a similar interval of two months for the payment of each succeeding call. He paid the first before he made his transfer, and contends that the directors could not lawfully *make* the second, until after the time fixed for the payment of the first, and so on with regard to the others.

In the *Stratford Railway Co. v. Stratton*, 2 B. & Ad. 518, a similar question arose, and the court held that payment of calls so made could not be enforced. The words of the act under consideration in that case were, "So that no calls should be made but at the distance of two calendar months at the least from each other." I can draw no solid distinction between the words of this act and those in our own. The courts say, that the calls are to be made at intervals, and the committee (in our case, the directors) are to judge from time to time of the necessity of making them. In the *Toronto Gas Co. v. Russell*, 6 U. C. Q. B. 567, this case is referred to as apparently settling the question, and it is again mentioned with more direct approval in *London Gas Co. v. Campbell*, 14 Q. B. U. C. 143.

In *Reg. v. Londonderry, &c., Railway Co.*, 13 Q. B. 998, it was held that a call of money on shares is made in point of time when the resolution to call is passed, which shews that in the case now in judgment these five calls were made all at once, and not at the required intervals, though the money was only made payable after successive delays of two months.

I think, that on this state of facts, there was but one call legally made, which call the defendant is admitted to have paid, and therefore, he was not prevented by any thing contained in the act from making a transfer. To hold otherwise would be in effect to grant to the directors a power to prevent the transfer of any shares for an indefinite period. The statute does not limit the interval between the calls to two months; it may be a greater, though not a less interval, or if made payable at the same interval of two months, the time may be prolonged by the directors. They might, if the plaintiffs are right, at an early period call in all the stock by instalments of ten per cent., making the latter of the instalments payable at an interval of years, and so prevent a share being transferred until the last payment fell due, and was paid, unless indeed a stockholder chose to pay in advance of the time fixed by the call.

The demurrer to the replication raises the question whether the transfer of the shares to an insolvent, in order to relieve the holder from the burden of paying further instalments, is such a fraud as to vacate the transfer. But no authority was cited, nor have I met with any decision which establishes that a shareholder is prevented from disposing of his shares, on any terms he pleases, and to any person, even to an insolvent. He may give them away if he likes, provided that when he makes the transfer he owes nothing for calls. The question was raised, but not decided, in *Crawford v. Prov. Ins. Co.* And *In re The Mexican and South American Co. ex parte Griswood and Smith*; *In re the same ex parte DePass* (5 Jur. N. S. 1191) the decision was in favour of the right to transfer under precisely similar circumstances, though Lord Campbell expresses some doubt in the latter case, *ex parte Hyam*, 6 Jur. N. S. 181. See also *ex parte Jessop*, 5 Jur. N. S. 1; *Lund's case*, 5 Jur. N. S. 400.

I think therefore the defendant is entitled to judgment on this demurrer.

This decision involves the same points as those upon which the defendant had leave to move for a nonsuit; and as a consequence we make that rule absolute.

HAGARTY, J.—I think the defendant is entitled to judgment. His defence is, that the five calls were made on the same day, and therefore that one only of them is valid, and the remaining four in fact void.

According to the decision of the court in *Moore v. Hickland*, it is unnecessary to make any statement in the declaration of calls being made. It only becomes important on this case in consequence of the transfer to Hossack. This transfer was in my opinion valid on the authority of the cases cited—1 DePass's case (5 Jur. 1191)—being very like this, unless any previous call had not been paid. It is conceded that defendant paid the first of the five calls long before the transfer. As our statute is worded, it seems to me that it was not in the power of the directors to make more than one call at the same time. It may have been intended to say that no call should be made *payable* at a less interval than two months from the previous call, but the words are, "no call shall be *made* at a less interval," &c.

I think the cases cited by Mr. Burton shew that the fact of defendant's being a director concerned in making the call, can work no estoppel in favour of these plaintiffs. Between him and the company such a question might arise, but the courts seem to consider that this being a purely statutable remedy in favour of creditors must be strictly pursued. The distinction is clearly pointed out in *Ness v. Angas*, 3 Ex. 805; *Ness v. Armstrong*, 4 Ex. 21. All the statements as to garnishment proceedings may be struck out from the plea, leaving it a good legal bar.

Per cur.—Judgment for defendant.

ALLEN V. ALEXANDER.

Merger—Satisfaction by security of a higher nature.

The acceptance of a conveyance by way of mortgage for a simple contract debt of a larger amount than that secured and covenanted to be paid by the mortgage, is a satisfaction of the simple contract debt for the larger amount.

DECLARATION on two promissory notes for £150 each, made by defendant, payable to plaintiff, dated the 16th of July, 1856.

Pleas.—1. Except as to \$1200 33c. payment. 2. As to \$1200 33c., parcel, &c., that before action he satisfied the same by delivering to plaintiff a mortgage, dated, &c., the 28th of April, 1858, on parts of lot No. 25, 13th concession of Lobo, made by defendant, securing to plaintiff payment of \$1000, and interest, which mortgage defendant delivered and plaintiff accepted in discharge of the sum of \$1200 33c. Issue.

The case was tried in October last, at London, before Sir J. B. Robinson, C. J. On the defence it appeared that the defendant had given to plaintiff four notes, for the purchase money of the south-half of No. 28, 14th concession of the township of London, which the plaintiff conveyed to defendant on the same day the notes were given, i. e., the 16th of July, 1856. The notes sued upon were respectively payable on the 1st of March, 1859 and 1860, with interest from the date. On the 28th of January, 1860, there was a settlement between plaintiff and defendant; the latter had a claim against the plaintiff for blacksmith work, which was agreed to be £81 12s. 4d., and the note due the 1st of March, 1859, with interest being computed, a balance was struck of £68 7s. 8d. due on that note to plaintiff. Nothing was then said about the mortgage pleaded, nor was it then pretended by defendant that anything more was paid on that note than the sum of £81 12s. 4d. The mortgage was proved and was as set out in the plea, for the payment of \$1000, upon part of lot 25, 13th concession Lobo, and contained a covenant to pay the amount secured. The witness who proved the mortgage swore that he understood it was given for "payment on the land," "for the purchase money

of the land." At the date of this mortgage neither of the notes sued upon were due.

The plaintiff claimed as a balance on		
the first note	£68	7 8
Interest thereon.....	7	3 8
And on the second note.....	150	0 0
Interest thereon.....	47	5 0
<hr/>		
	£272	16 4

The learned Chief Justice directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him.

In Michaelmas Term, *Bayley* obtained a rule nisi to enter a verdict for the defendant on the leave reserved.

D. B. Read, Q. C., shewed cause.

Bayley, contra, cited Addison on Contracts, 1099; Price v. Meulton, 10 Com. B. 561; Parker v. McCrea, 7 U. C. C. P. 124; Fraser v. Armstrong, 10 U. C. C. P. 510; Fairman v. Maybee, 7 U. C. C. P. 467; Matthewson v. Brouse, 1 U. C. Q. B. 272; McLeod v. McKay, 20 U. C. Q. B. 258; Bell v. Banks, 3 M. & G. 258.

DRAPER, C. J.—It is a well settled rule that where a security of a higher nature is taken for a debt, the remedy on any lower security for the same debt is extinguished. The application of that rule depends on the question whether the debt secured by the mortgage is identical with the debt shewn by the two promissory notes. Upon this part of the case I see no room for doubt, and if not, then the only question is whether a mortgage for a smaller sum can in law be treated as a satisfaction of a simple contract debt for a larger, being pleaded and proved to have been accepted as such. I say proved, because, first, there was evidence enough to warrant the conclusion; and second, because, unless we assume that the fact be so, there was no ground on which the question could be reserved for our determination. The case of *Cumber v. Wane*, 1 Stra. 426, certainly decides that giving a note for £5 cannot be pleaded

as a satisfaction for a debt of £15, but there the security for the smaller sum was of no higher degree than the original debt for the larger, and the case of *Sibree v. Tripp*, 15 M. & W. 23, seems entirely opposed to its authority, and the decision goes further, as well as on a different ground from what we may rest our judgment upon. Now in the present case the plaintiff obtained a conveyance of land, liable, it is true, to be defeated on payment of \$1000, with interest, and accepted it in discharge of two notes not then due for \$600 each, with interest. If the land had been conveyed absolutely, though not worth £10, and had been accepted in satisfaction, it would have extinguished the debt, and it is difficult to say upon what ground the mortgage of the land, accepted as a discharge, should not operate as such, though for a smaller sum. It is a better security, and it is accompanied by a covenant to pay. The whole reasoning in *Sibree v. Tripp*, on that question, seems to me in defendant's favour.

I am strongly inclined to believe, however, that the facts are so much more in favour of the defendant as rather to exclude this question. The two notes for \$600 each, and interest to the date of the settlement, would amount to about \$1326. The amount of the blacksmith's account and the mortgage would come to the same sum.

Per cur.—Rule absolute.

See *Loomis v. Ballard*, 7 U. C. Q. B. 336; *Twopenny v. Young*, 3 B. & C. 210; *Price v. Moulton*, 10 C. B. 561; *Ford v. Beech*, 11 Q. B. 852.

HOLDER V. JACKSON.

Auctioneer—Contract with—Bidder—How far auctioneer is bound to accept all bids indiscriminately.

An auctioneer is not bound to accept all bids, as a matter of course, from persons present at his auction. An action, therefore, will not lie for refusing to accept such bids unless by reason of some special condition or terms of the sale.

DECLARATION, third count.—Also, for that the plaintiff had the reputation of, and was in the habit of attending sales at

public auction, and purchasing articles thereat both on his own account, and on commission for other persons; and the defendant, as such auctioneer aforesaid, held the sale at public auction, in the second count mentioned, under the conditions hereinafter mentioned, that is to say: "Terms and conditions of auction sale of household furniture, bar fixtures, &c., Kingston, September 7th, 1858: each and every article to be taken as it may turn out, good, bad, or indifferent; any lot in dispute at the time of being adjudged to be re-sold to the highest bidder. Term of payment, cash, prior to the goods being removed or delivered, which is to take place after the sale is closed, and any articles remaining unsettled for agreeable with the terms of sale will be re-sold on account and risk of the purchaser, but persons purchasing to the extent of fifty pounds, or upwards, can have a credit of three months by furnishing approved endorsed notes." And the plaintiff relying upon the said conditions of sale hereinbefore recited, did attend the said sale, and bid in and purchased a large number of articles thereat, other than those in the second count mentioned; but the defendant, after the plaintiff had so bid in and purchased a large number of articles at the said sale, as last aforesaid, wrongfully, maliciously, and without reasonable or just cause, wholly refused to accept the plaintiff's biddings for other and subsequent articles put up by the defendant, so being such public auctioneer, for public competition and sale at the said auction, although such biddings were at different times tendered to the defendant. And the defendant thereby prevented the plaintiff from becoming the highest bidder for and purchaser of a large number of articles at the said auction, whereby the plaintiff lost a large sum of money on the articles already purchased by him at the said auction, and lost divers profits and the benefit of the credit mentioned in the said recited conditions of sale, and was injured in his said reputation and business of purchasing at auction on commission, and in his credit, and was otherwise damnified. And the plaintiff claims forty dollars.

And as to the third count of the declaration the defendant says that the same is bad in substance, on the ground that

an auctioneer at a sale by public auction is not compelled to receive indiscriminately the biddings of persons attending the sale, but has an unqualified discretion to exercise as to any particular bidder's credit and responsibility, and the consequent right to receive or refuse his bid.

The following points were insisted on the part of the defendant on the argument of the demurrer herein :

1st. That an auctioneer at a sale by public auction is not compelled to receive indiscriminately the biddings of persons attending the sale, but has an unqualified discretion to exercise as to any particular bidder's credit and responsibility and the consequent right to receive or refuse his bid, and the conditions of sale are no estoppel.

2nd. That the plaintiff at the said auction sale was not bound to purchase, therefore there was no consideration to bind the defendant to sell, so that there was no mutuality. The contract was all on one side, therefore *nadum pactum*, and there was no complete contract of sale.

3rd. That the plaintiff should have averred that in the event of his having become the purchaser of goods at the said sale to an amount to have entitled him to the credit mentioned in the conditions of sale, that he had in his possession, or was prepared to, and could have furnished promissory notes for the amount of his purchases, that would have been approved of by the defendant according to the conditions of the sale.

Geo. Draper, for defendant, contended that the declaration was bad, because it did not aver that plaintiff was willing to purchase to £50, or give security. Gist of the action is whether an auctioneer has a right to refuse to take a bid or not. He cited Addison on Contracts, 39; Payne v. Cave, 3 T. R. 148; Cooke v. Oxley, 3 T. R. 653.

Chas. Gildersleeve, contra, contended that the plaintiff had the right to purchase, if the property was sold at auction. He cited Fuller v. Abrahams, 6 Moon. 306.

Richards, Q. C., for the defendant, referred to Warlow v. Harrison, 28 L. J. Q. B. 18; Wardell v. Harrison, 5 Jur. N. S. 313; 8 C. 6 Jur. N. S. 66.

DRAPER, C. J.—The declaration charges the defendant with wrongfully, maliciously, and without reasonable or just cause refusing to accept plaintiff's biddings at an auction for articles offered for sale, when the plaintiff had already been the highest bidder for, and had certain other articles knocked down to him as the purchaser thereof. The inducement laid is, that plaintiff was in the habit of buying at auctions for himself and on commission for other persons, (not averring notice thereof to defendant.) That defendant as an auctioneer was holding a sale at public auction on the following conditions; every article to be taken as it as it may turn out to be good, bad, or indifferent; any lot in dispute at the time of being adjudged to be re-sold to the highest bidder. Terms of payment, cash, prior to the goods being removed or delivered, which is to take place after the sale is closed. Any articles remaining unsettled for agreeably to the terms of sale to be re-sold on account and risk of the purchaser. Persons purchasing to the extent of £50 or upwards, can have a credit of three months, by furnishing approved endorsed notes. Plaintiff does not assert that he was the highest bidder for any article which was not adjudged to him, but that the refusal of his bids prevented his becoming the highest bidder. Nor does he aver that he purchased some articles with intent to buy others, enough together to amount to £50; that defendant's refusal to accept subsequent bids prevented this, whereby he was obliged to pay cash for what he did buy. His claim rests on the assumption that an auctioneer at a public sale must receive the bidding or offer of any and every person present, and does a wrong to any person whose bidding or offer he declines to notice and receive.

I can understand that possibly an auctioneer may do a wrong to the seller, by refusing bids. As he is agent for the seller *ab initio* he has, I apprehend, the right to settle not merely the terms of sale, but to regulate the biddings; as for example, to say he will not receive any bid which does not advance a given sum upon the last preceding bid. He is under no contract with the intending purchasers, unless it arises from the expressed terms or conditions of sale, until by accepting their bids he becomes bound to complete the

sale according to those conditions, as in case his conditions state the sale to be without reserve, he is bound as by a contract to sell to the highest bidder, who is not the owner or agent for the owner, in other words, a bid by or on behalf of his principal is contrary to the contract to sell *without reserve*, and the auctioneer cannot receive it to the prejudice of the last preceding bidder. Warlow v. Harrison, (5 Jur. N. S. 313, and 6 J. N. S. 66.)

But in a sale such as is stated in this count, I do not understand on what ground any person can claim as a right to be allowed to bid—to offer to become a purchaser. It will be going beyond any authority I have seen to hold, that by holding an auction under such circumstances there is an implied duty or contract to deal with any person who presents himself, and that the auctioneer, with due regard to his responsibilities to his principal has not a right to refuse to deal with any particular person. The principal might refuse from mere caprice to sell to A., B. or C., and might direct the auctioneer to refuse to sell to certain parties, and I can see no reason why the auctioneer (the agent) is bound by law to accept offers or bids, any more than his principal would be. There are no special circumstances shewn to prevent his exercising a discretion, which may be very necessary under the circumstances easy to imagine. In the absence of authority to the contrary, and in the absence of any sound reason that I can perceive to uphold a contrary decision, I think the defendant should have judgment on this demurrer.

Per cur.—Judgment for defendant.

WILSON ET AL. V. THE CORPORATION OF THE UNITED COUNTIES OF HURON AND BRUCE.

Reference—Order of—Counsel—Authority to bind by undertaking—Agent of defendants' attorney—As such power to bind defendants—Award.

The rule for a reference in this cause was granted on reading the consent to refer endorsed on the record at *nisi prius*; it stated that the cause and all matters in difference between the parties should be referred to S. C., and among other things, stated that the evidence as taken before the judge at *nisi prius* should be read before the arbitrator, and that any question of law which should arise, at the request of either party should be referred to the court, and costs of cause, reference and of the award to abide the event. The order of reference as made a rule of court differed from the above memoranda, in these among other things—1st, by directing that costs, &c., should be in the discretion of the arbitrator. 2nd, that the arbitrator should not be required to reserve any legal questions for the decision of the court.

Messrs. W. P. & B. acted throughout this matter as agents for the defendants' attorney, all the papers in the suit being served upon them; and W., one of the members of the said firm, was counsel for defendants in the cause both at *nisi prius* and before the arbitrator.

It was proved that on an undertaking of W. as counsel for defendants not to raise any question of law the terms of the reference were altered as above by consent of W. and of counsel for the plaintiffs.

On motion to set aside the award and final judgment, *held*, that W. had power and authority either as counsel or as agent for the defendants' attorney in his discretion in the matters in this suit to bind the defendants; and that accordingly defendants were bound by his (W.'s) undertaking as above, and the award must therefore be upheld.

R. A. Harrison obtained a rule *nisi* in the Practice Court, returnable here, calling on the plaintiffs to shew cause why the agreement, dated the 17th of August, 1861, should not be declared null and void on the ground that Adam Wilson, Esq., had no authority to enter into it so as to bind defendants, or why so much of the order of reference and rule embodying the same as directs that the arbitrator shall not be required to reserve any legal question for the opinion of the court, but that his conclusion on the law and facts should be final; and that the arbitrator should have power to fix the period for payment of any sum he may award, should not be rescinded or varied upon the ground that the order and rule depart from the terms of the consent for a reference, and why the award and final judgment entered in this cause should not be set aside on the following grounds: 1st. That the arbitrator exceeded his authority in determining questions of law and awarding as to costs in a manner not authorised by the terms of the original reference. 2. That

the arbitrator in doing so acted under an agreement, dated the 17th of August, 1861, purporting to have been made between Hector Cameron, Esq., attorney for the plaintiffs, and Adam Wilson, Esq., acting for defendants, which agreement, so far as the said A. Wilson was concerned, was in excess of any authority which he possessed, and in no manner binding on defendants. 2. That the arbitrator ordered payment of the sum of money at a future day when no authority so to do was given by the terms of the original reference. 4. That the award is contrary to law in this, that under the first count of the declaration, in respect to which the arbitrator awarded to plaintiffs \$6500, the plaintiffs are not in law entitled to recover from the defendants the said sum, or any sum whatever. 5. That the award is contrary to law and evidence, in this, that under the third count, in respect to which the arbitrator awarded to plaintiffs \$5962, plaintiffs are not entitled to recover from defendants the said sum, or any sum whatever. 6. On grounds disclosed in affidavits and papers filed. Or why, notwithstanding the agreement of the 17th of August, 1861, and the award, the cause should not be again referred to the arbitrator upon the terms of the original reference, freed of the provision of the agreement of the 17th of August, 1861. On the ground that the agreement is not binding on the defendants, and was in excess of the authority of the said A. Wilson.

The rule was granted on reading, first, the consent to refer, endorsed on the record at *nisi prius*, which was that the cause and all matters in difference be referred to the arbitration of S. Connor, Q. C., with power to examine witnesses under oath, and the same power of amendment as a judge at *nisi prius*. Award to be made before the first day of Easter Term, then next, or such other time as the arbitrator might in writing enlarge the reference to. A verdict to be taken for the plaintiffs, with \$20,000 damages, subject to be reduced, increased, or a verdict entered for defendants by the arbitrator. The evidence as taken by the judge at *nisi prius* to be read before the arbitrator, and any question of law arising in the case to be referred to the court, at the

request of either party; costs of the cause, reference and award to abide the event.

The order of reference as made a rule of court differed from this, by directing that the costs of the cause, reference, and award be in the discretion of the arbitrator; and that the arbitrator should not be required to find specifically on the issues, but might award damages generally on the various counts. And by directing that each party should produce books, papers, &c., to the arbitrator, and that the arbitrator should not be required to reserve any legal questions for the opinion of the court, but his conclusion and award on the law and facts should be final, and that he should have power to fix the period of any sum he might award, without delaying plaintiffs' right to enter judgment.

The award, dated the 24th of August, 1861, after divers recitals, determined the first and third counts of the declaration (the first count being a special count on a contract entered into between plaintiffs and defendants, and the third being an aggregate of the common counts) in favour of the plaintiffs, and the arbitrator assessed damages of plaintiffs, in respect of the matter in the first count, and the issues joined, thereon, mentioned at \$6500, and in respect of the matter in the common counts at \$5962. The arbitrator ordered the costs of the cause in respect of the first and third counts, when taxed, to be paid by defendants. No damages were assessed to plaintiffs on the second count, and no costs thereon given to either party. Each party were to pay their own costs of the reference. The defendants to pay the costs of the award. The verdict to be reduced, and the judgment entered for plaintiffs on the first and third counts for the respective sums above mentioned, amounting together to \$12,462. The amount of judgment, including costs, when taxed, and of award to be paid by defendants to plaintiffs on the 15th of October, 1861, but that delay was not to effect the plaintiffs' right to enter judgment.

The affidavit of Robert Gibbons, warden of the united counties, stated, among other matters, the making of an agreement, dated the 16th of August, 1861, between the

counsel for the defendants, Adam Wilson, Esq., and the plaintiffs' attorney, to the effect following: that such agreement should be taken as part of the order of reference, and as if embodied in the original submission. That the arbitrator should not be required to find specifically on the issues, but might award or assess damages generally, or on the different counts. That the costs of the cause, reference, and award, should be in the discretion of the arbitrator. That the arbitrator should not be required to reserve any legal questions for the opinion of the court, but his conclusion and award on the law and facts should be final, and that he should have power to fix the period for the payment of any sum he might award, but that provision was not to affect the plaintiffs' right to enter judgment under the reference and award.

Mr. Gibbon's affidavit then stated that Mr. Wilson had no authority whatever from the defendants to enter into that agreement, nor any power or permission so to do. That defendants had no knowledge of said agreement until about the 20th of September. That defendants desired and intended to have all legal questions referred to the court. That the award was not served on defendants' counsel until the 12th of September, 1861, and defendant had no knowledge of its contents until it was too late to move to set it aside.

Malcolm C. Cameron, the defendant's attorney, also makes an affidavit, that he did not authorise Mr. Wilson to enter into the agreement set out in the award, nor had he any knowledge thereof until he received the award about the middle of September last. That such agreement was entered into by Mr. Wilson, without the knowledge, permission, or authority of the defendants, or their attorney. That several legal questions were raised before the arbitrator by defendants' counsel, (Mr. Wilson,) which, if referred to the court, would, as the attorney believes, be found in favour of defendants. That the award was not served on defendants, or their attorney, nor had they any knowledge of the contents thereof until it was too late to apply to the court against it last term.

An additional affidavit of Mr. Gibbon was put in, reiterating the statements of the former one, and adding, that from the moment the defendants became aware of the contents of the award, and the consent of Mr. Wilson to the alteration of the rule of reference, it was determined to resist the award and to apply to set it aside. That he never led the plaintiffs' attorney to believe the money would be paid as directed by the award, of which they had no notice served on them until after last term, nor were they aware of the publication of the award, nor had they any notice thereof until after the period aforesaid. Annexed to this affidavit is the affidavit of Alexander M. Ross, treasurer for the united counties, stating, that he was the principal party engaged in advising with the counsel in this case, at Toronto, and was in frequent communication with A. Wilson, Esq., Q. C., who was acting for defendants, and is well acquainted with the facts attending the case and arbitration. That he has carefully read over the annexed affidavit of Mr. Gibbons, and knows it to be true in substance and in fact, except the paragraph denying that Mr. Gibbon ever led the plaintiffs' attorney to believe the money would be paid, and that he believes to be true.

The defendants' attorney makes a second affidavit denying that Mr. Wilson had authority or permission from defendants or their attorney to make the agreement of the 17th of August, 1861, and asserting that the award was not served on defendants or their attorney, nor had they any knowledge of its contents or any notice of the publication thereof until it was too late to apply to the court last (*i. e.* Trinity) term to set it aside, and that judgment has been entered and execution placed in the sheriff's hands in this cause.

S. Richards, Q. C., and *Hector Cameron* shewed cause. The plaintiffs' attorney made an affidavit stating that immediately after the commencement of this suit, the defendants attorney instructed him to serve all papers in this suit on Mr. Adam Wilson, or on the firm of Wilson, Patterson & Beatty, of which firm Mr. Wilson is a member, and to treat him and his firm as the agents of him, the defendants' attorney, in consequence of the usual agent of the defen-

dants' attorney being retained on behalf of the plaintiffs. That Mr. Wilson and his firm acted throughout this suit as agents for the defendants' attorney, and received and served all papers and documents herein. That the award was made and published by the arbitrator herein, on the Saturday before last Trinity Term, and the plaintiffs' attorney having received notice on that day from the arbitrator that he had published his award, he served on the same day notice on Mr. Wilson that the award was published. That it was distinctly understood by both parties during the argument before the arbitrator that the award would be published before Trinity Term. That on the first or second day of Trinity Term the plaintiffs' attorney had a conversation with Mr. Wilson as to the award, when Mr. Wilson spoke in general terms of the contents of the award. That up to or about the 24th of October, 1861, plaintiffs' attorney had no intimation that the defendant meant to contest the award, but had been previously led to believe by conversation with the treasurer, and with the attorney of defendants, that they acquiesced in the award and would pay the amount, and that at the request of the attorney for defendants he delivered to him his bill of costs and affidavit of disbursements about the 1st of October. That Mr. Wilson acted as agent for the defendants' attorney, and as counsel for defendants throughout the whole case. That the arbitrator here was not requested to state any question of law for the opinion of the court, there having been merely a conversation whether he should be so requested. That after the evidence had been given and a long argument concluded, a discussion arose between the counsel and the arbitrator as to the authority of the latter, and the necessity for reserving any question of law. Mr. Wilson stated that the only question of law as to the first count that could be raised was in reference to the agency of Bosanquet & Co. That the arbitrator intimated that he would have to find as a fact that the said firm were the agents of the defendants alone, and such finding would virtually determine the suggested question of law, and from the evidence, the finding on the questions of fact necessary to raise the question of law must be in

An additional affidavit of Mr. Gibbon was put in, reiterating the statements of the former one, and adding, that from the moment the defendants became aware of the contents of the award, and the consent of Mr. Wilson to the alteration of the rule of reference, it was determined to resist the award and to apply to set it aside. That he never led the plaintiffs' attorney to believe the money would be paid as directed by the award, of which they had no notice served on them until after last term, nor were they aware of the publication of the award, nor had they any notice thereof until after the period aforesaid. Annexed to this affidavit is the affidavit of Alexander M. Ross, treasurer for the united counties, stating, that he was the principal party engaged in advising with the counsel in this case, at Toronto, and was in frequent communication with A. Wilson, Esq., Q. C., who was acting for defendants, and is well acquainted with the facts attending the case and arbitration. That he has carefully read over the annexed affidavit of Mr. Gibbons, and knows it to be true in substance and in fact, except the paragraph denying that Mr. Gibbon ever led the plaintiffs' attorney to believe the money would be paid, and that he believes to be true.

The defendants' attorney makes a second affidavit denying that Mr. Wilson had authority or permission from defendants or their attorney to make the agreement of the 17th of August, 1861, and asserting that the award was not served on defendants or their attorney, nor had they any knowledge of its contents or any notice of the publication thereof until it was too late to apply to the court last (*i. e.* Trinity) term to set it aside, and that judgment has been entered and execution placed in the sheriff's hands in this cause.

S. Richards, Q. C., and *Hector Cameron* shewed cause. The plaintiffs' attorney made an affidavit stating that immediately after the commencement of this suit, the defendants attorney instructed him to serve all papers in this suit on Mr. Adam Wilson, or on the firm of Wilson, Patterson & Beatty, of which firm Mr. Wilson is a member, and to treat him and his firm as the agents of him, the defendants' attorney, in consequence of the usual agent of the defen-

dants' attorney being retained on behalf of the plaintiffs. That Mr. Wilson and his firm acted throughout this suit as agents for the defendants' attorney, and received and served all papers and documents herein. That the award was made and published by the arbitrator herein, on the Saturday before last Trinity Term, and the plaintiffs' attorney having received notice on that day from the arbitrator that he had published his award, he served on the same day notice on Mr. Wilson that the award was published. That it was distinctly understood by both parties during the argument before the arbitrator that the award would be published before Trinity Term. That on the first or second day of Trinity Term the plaintiffs' attorney had a conversation with Mr. Wilson as to the award, when Mr. Wilson spoke in general terms of the contents of the award. That up to or about the 24th of October, 1861, plaintiffs' attorney had no intimation that the defendant meant to contest the award, but had been previously led to believe by conversation with the treasurer, and with the attorney of defendants, that they acquiesced in the award and would pay the amount, and that at the request of the attorney for defendants he delivered to him his bill of costs and affidavit of disbursements about the 1st of October. That Mr. Wilson acted as agent for the defendants' attorney, and as counsel for defendants throughout the whole case. That the arbitrator here was not requested to state any question of law for the opinion of the court, there having been merely a conversation whether he should be so requested. That after the evidence had been given and a long argument concluded, a discussion arose between the counsel and the arbitrator as to the authority of the latter, and the necessity for reserving any question of law. Mr. Wilson stated that the only question of law as to the first count that could be raised was in reference to the agency of Bosanquet & Co. That the arbitrator intimated that he would have to find as a fact that the said firm were the agents of the defendants alone, and such finding would virtually determine the suggested question of law, and from the evidence, the finding on the questions of fact necessary to raise the question of law must be in

favour of the plaintiffs. When Mr. Wilson suggested that if the plaintiffs' counsel would leave the whole question of costs to the arbitrator, and allow him to fix a time for the payment of the money awarded, he (Mr. W.) would be disposed not to raise any question of law, and after consideration for a day or two, the agreement altering the terms of the reference was arrived at; the only inducement for the plaintiffs' counsel to consent to alter the terms of the reference was to avoid further delay. That the defendants' attorney was not present at the trial, nor at any sitting of the arbitrator, nor at the argument of the demurrers, but Mr. Wilson attended at all the sittings of the arbitrator, nearly thirty, except two or three at the beginning, and the whole management of the case from the drawing of the pleas until the taxation of costs on the 24th of October, 1861, was entrusted to and conducted by Mr. Wilson.

Richards, Q. C., and *Hector Cameron* shewed cause, citing *Swinfen v. Swinfen*, 18 Com. Bench, 485, and 3 Jur. N. S. 1109; *S. C.* 1 Com. B. N. S. 364, and 5 H. & N. 890; *Thomas v. Harris*, 27 L. J. Ex. 353; *Chambers v. Mason*, 5 Com. B. N. S. 59; *S. C.* 4 Jur. N. S. 1037; *Hall v. Featherstone*, 3 H. & N. 284; *In re Hobler*, 8 Bea. 101; *Rees v. Waters*, 16 M. & W. 269.

R. A. Harrison, in support of the rule, cited *Wade v. Simeon*, 13 M. & W. 647; *Fernival v. Bogle*, 4 Russ. 142; *Hargrave v. Hargrave*, 12 Beav. 408; *Colledge v. Horn*, 3 Bing. 119; *Brooks v. Parsons*, 1 D. & L. 691; *In re Burt*, 5 B. & C. 668; *Hayward v. Phillips*, 6 A. & E. 119; *Potter v. Newman*, 4 Dow 504.

DRAPER, C. J.—The first question is, whether this application is not too late. The rule *nisi* was moved on the 4th day of Michaelmas Term (21st November) in the Practice Court returnable here. The award is dated the 24th August last. The following Monday, August 26th, was the first day of last Trinity Term. No application of any kind was made until the 24th of October, 1861, when a summons was obtained in Chambers to stay proceedings. This ap-

pears only from the statement of counsel in argument from some of the affidavits referred to in drawing up the rule *nisi*, being marked as filed in Chambers on the 24th October, 1861, and attached to the copy of award and other papers put in on moving for the rule *nisi*. The delay to move is accounted for on the part of the defendants, by statements contained in the two affidavits of Gibbons, the warden of the united counties, (the defendants,) and in two affidavits of the defendant's attorney, one of each, having been sworn the 21st October, 1861, and used on the application in Chambers; the others being sworn on the 16th and 18th November, respectively. The one first sworn by the warden, states that the award was not served on defendant's counsel until the 12th of September, 1861, nor had defendants any knowledge of its contents until it was altogether too late to set the same aside last (Trinity) term.

The first affidavit made by defendants' attorney states that the award was not served on defendants or their attorney, nor had they any knowledge whatever of the contents thereof until it was too late to apply to the court last (Trinity) term.

In his second affidavit the warden repeats his former statement, and adds (par. 16) that defendants had no notice whatever served on *them*; that such award was not made until after last term; nor were *they* aware of the publication of the award, nor had *they* any notice whatever thereof until after the period aforesaid.

And the second affidavit of the defendants' attorney swears that the award was not served on the *defendants* or their attorney, nor had they any knowledge whatever of the contents or any notice of the publication thereof until it was too late, &c.

There is a palpable inadvertence involving an apparent inconsistency in the manner in which the term "defendants" is used, as if they were individuals instead of being a corporation. It would have been more to the purpose to deny notice and knowledge on the part of those officers of the corporation, notice to whom would be notice to the "defendants." The second affidavit of the defendants' attorney is

inconsistent with the idea that in denying notice or knowledge to or on the part of the "defendants" he can refer to and include implied or legally imputed notice or knowledge, or he would not have stated that the award was not served on the defendants or their attorney, since service on him as their attorney would, for all purposes now under discussion, have been service on them; notice of publication or of the contents of the award to him would have been notice to them, and notice to, or service on, his duly authorised agent as the defendants' attorney would have been notice to, and service on, himself.

On the other side two affidavits are made by the plaintiffs' attorney, the first sworn on the 26th of October, the last on 29th November. In the first it is stated that the defendants' attorney and their treasurer within the last month "both led him to believe that the money would be paid on the 15th October as directed." That the defendants' counsel, meaning Mr. Wilson, was aware of the terms of the award within the first two days of Trinity Term, although a copy of the award was not then served, "but a notice of publication of the award was served on the defendants before the first day of" Trinity Term.—(par. 7). And further, (par. 9,) that Mr. Adam Wilson acted as agent for the defendants' attorney, and as counsel for the defendants. This affidavit was known to the warden when he made his second affidavit, as the 15th paragraph thereof shews, and must, I think, have been also known to the defendant's attorney. And yet in all the affidavits filed on behalf of the defendants, all reference to Mr. Wilson as agent for the defendant's attorney is most studiously avoided, not a word is said of any communication to or from him on the subject of his making the agreement of the 17th August, or of his being agent of the defendants' attorney, or of his having had notice of publication, or even being served with the award, though the warden swears the award was not served on the defendants' counsel until the 12th of September, 1861, (2nd afft. par. 11,) a fact not otherwise appearing on the papers before us, except by an endorsement on the copy of the award, which is attached to an affidavit of the defendants' attorney sworn the 10th

November, that such copy was not served until the 12th September, 1861, as appears by the memorandum thereof endorsed thereon by the counsel for the defendants.

The second affidavit made by plaintiffs' attorney states more fully that on the same day the award was made, he served Mr. Wilson with notice that the award was published. That Mr. Wilson, on the first or second day, knew generally the contents of the award, and that he acted as agent for the defendants' attorney. And (par. 2 & 3) that plaintiffs' attorney was told by defendants' attorney to serve all papers in the suit upon Mr. Wilson, or the firm of Wilson, Patterson & Beatty, of which Mr. Wilson is a member, and to treat him and his firm as the agents of the defendants' attorney in this suit, and that Mr. W. and his firm acted throughout this suit as agents for defendants' attorney, and received and served all papers and documents therein. And again, (par. 14) that defendants' attorney was not present at the trial or at any of the sittings of the arbitrator. And the whole management of the defendants' case from the drawing of the pleas until the taxation of the costs was entrusted to and conducted by Mr. Wilson.

From the manner in which Mr. Wilson's alleged want of authority to make the agreement of the 17th August is pressed upon us, I do not doubt that his character as agent of the defendants' attorney would have been repudiated if he had not filled that position. I conclude that Mr. Wilson especially, and his firm generally were agents in this cause for the defendants' attorney; and that they had notice of the publication of the award before Trinity Term. I doubt as little that if there had been any omission on Mr. Wilson's part duly to advise the defendants' attorney of the proceedings, we should have heard of it unless the matter was so entirely left to Mr. Wilson's management as to make this unnecessary. The very guarded and confined language in which the defendants' attorney denies notice or knowledge, fails to satisfy me that he was not informed by Mr. Wilson of the steps and proceedings taken in the cause, and I think justifies the conclusion that he had an actual as well as the imputed knowledge which arose from services on, and notice to, his agent.

And if the application had been merely to set aside the award, I should have been prepared to hold it too late, not having been made in Trinity Term, or possibly because not made within the first four days of that term.

But a difference is taken in this case, where a judgment entered upon an award is moved against, and it appears settled that such a motion is not so limited in point of time, but it can only be made on objections apparent on the face of the award, and the argument for the plaintiffs is, that the agreement of the 17th of August being set out on the award, the objection is open on this motion, and that as Mr. Wilson had no authority to bind the defendants by it, the award is bad.

The form of the objection is, that Mr. Wilson, as defendants' counsel, had no authority to change the original submission, and vary and extend the authority given to the arbitrator.

I take it to be sufficiently established that Mr. Wilson filled not only the character of counsel for defendants, but also of agent to the defendants' attorney. Many authorities shew the authority of an attorney to refer a cause, to select the tribunal by which the matter in dispute between his client and the opposing party shall be decided, and some of them extend to counsel also. I refer generally to *Swinfen v. Lord Chelmsford*, 6 Jur. N. S. 1042; *Filmer v. Delber*, 3 Taunt. 486, which is approved in *Faviell v. The Eastern Counties Railway Company*, 2 Exch. 344, a case particularly applicable, for there, as here, the defendants were a corporation, and there, though not here, it was objected that it should be shewn that their attorney had authority under seal to defend or refer the cause. The language of the judges as to the authority of the attorney to refer a cause is explicit, and if this be so, it carries with it power to alter or vary the terms of the submission. The case of *Hatton v. Royle*, 3 H. & N. 500, does not conflict with this view, while the case of *Withers v. Parker*, 4 H. & N. 524, and in error, 5 H. & N. 725, shews the authority of the agent for the attorney to be as effectual in the matters entrusted to him as that of the attorney himself.

Upon either ground, therefore, viewing Mr. Wilson as counsel for the defendants, or as agent for the defendants' attorney, especially entrusted as he was, I am of opinion that he could and did bind the defendants by his agreement of the 17th August, 1861. This is the only objection apparent on the face of the award, or at all events any others apparent on the award depend on it, and as I think it fails, the rule must be discharged.

HAGARTY, J.—In this application it is admitted that the reference was duly made at *nisi prius* as endorsed on the record. This was signed by Mr. Wilson as representing the defendants. It contains a provision that any question of law should be referred to the court at the request of either party.

The chief point urged against the award is the agreement of the 17th August, 1861, as an alleged excess of authority on Mr. Wilson's part. This, gentlemen, as is abundantly evident, was entrusted either as counsel or agent for defendants' attorney with the management of the defendants' case before the arbitrator.

It appears to me to be of no moment whatever as to which position he filled. It is sufficient to say that on him devolved the legal management of the case, and it is not pretended that he acted otherwise than in perfect good faith and to the best of his judgment. I also consider that in this branch of the application it is quite immaterial whether he had or had not authority to make this agreement. To my mind it disposes of the question simply to state the fact that the arbitrator was not requested by defendants' counsel or agent to reserve any legal question for the court.

It must be borne in mind that we are not now discussing any dispute between the client and his professional adviser, but we are asked to set aside an award and judgment as against defendants on an alleged excess of authority.

I think the law would be in an intolerable state, and the conduct of suits rendered almost impracticable, if the court were bound to accede to defendants' view of the powers and duties of an advocate. It is matter of every day practice

request of either party; costs of the cause, reference and award to abide the event.

The order of reference as made a rule of court differed from this, by directing that the costs of the cause, reference, and award be in the discretion of the arbitrator; and that the arbitrator should not be required to find specifically on the issues, but might award damages generally on the various counts. And by directing that each party should produce books, papers, &c., to the arbitrator, and that the arbitrator should not be required to reserve any legal questions for the opinion of the court, but his conclusion and award on the law and facts should be final, and that he should have power to fix the period of any sum he might award, without delaying plaintiffs' right to enter judgment.

The award, dated the 24th of August, 1861, after divers recitals, determined the first and third counts of the declaration (the first count being a special count on a contract entered into between plaintiffs and defendants, and the third being an aggregate of the common counts) in favour of the plaintiffs, and the arbitrator assessed damages of plaintiffs, in respect of the matter in the first count, and the issues joined thereon, mentioned at \$6500, and in respect of the matter in the common counts at \$5962. The arbitrator ordered the costs of the cause in respect of the first and third counts, when taxed, to be paid by defendants. No damages were assessed to plaintiffs on the second count, and no costs thereon given to either party. Each party were to pay their own costs of the reference. The defendants to pay the costs of the award. The verdict to be reduced, and the judgment entered for plaintiffs on the first and third counts for the respective sums above mentioned, amounting together to \$12,462. The amount of judgment, including costs, when taxed, and of award to be paid by defendants to plaintiffs on the 15th of October, 1861, but that delay was not to effect the plaintiffs' right to enter judgment.

The affidavit of Robert Gibbons, warden of the united counties, stated, among other matters, the making of an agreement, dated the 16th of August, 1861, between the

counsel for the defendants, Adam Wilson, Esq., and the plaintiffs' attorney, to the effect following: that such agreement should be taken as part of the order of reference, and as if embodied in the original submission. That the arbitrator should not be required to find specifically on the issues, but might award or assess damages generally, or on the different counts. That the costs of the cause, reference, and award, should be in the discretion of the arbitrator. That the arbitrator should not be required to reserve any legal questions for the opinion of the court, but his conclusion and award on the law and facts should be final, and that he should have power to fix the period for the payment of any sum he might award, but that provision was not to affect the plaintiffs' right to enter judgment under the reference and award.

Mr. Gibbon's affidavit then stated that Mr. Wilson had no authority whatever from the defendants to enter into that agreement, nor any power or permission so to do. That defendants had no knowledge of said agreement until about the 20th of September. That defendants desired and intended to have all legal questions referred to the court. That the award was not served on defendants' counsel until the 12th of September, 1861, and defendant had no knowledge of its contents until it was too late to move to set it aside.

Malcolm C. Cameron, the defendant's attorney, also makes an affidavit, that he did not authorise Mr. Wilson to enter into the agreement set out in the award, nor had he any knowledge thereof until he received the award about the middle of September last. That such agreement was entered into by Mr. Wilson, without the knowledge, permission, or authority of the defendants, or their attorney. That several legal questions were raised before the arbitrator by defendants' counsel, (Mr. Wilson,) which, if referred to the court, would, as the attorney believes, be found in favour of defendants. That the award was not served on defendants, or their attorney, nor had they any knowledge of the contents thereof until it was too late to apply to the court against it last term.

An additional affidavit of Mr. Gibbon was put in, reiterating the statements of the former one, and adding, that from the moment the defendants became aware of the contents of the award, and the consent of Mr. Wilson to the alteration of the rule of reference, it was determined to resist the award and to apply to set it aside. That he never led the plaintiffs' attorney to believe the money would be paid as directed by the award, of which they had no notice served on them until after last term, nor were they aware of the publication of the award, nor had they any notice thereof until after the period aforesaid. Annexed to this affidavit is the affidavit of Alexander M. Ross, treasurer for the united counties, stating, that he was the principal party engaged in advising with the counsel in this case, at Toronto, and was in frequent communication with A. Wilson, Esq., Q. C., who was acting for defendants, and is well acquainted with the facts attending the case and arbitration. That he has carefully read over the annexed affidavit of Mr. Gibbons, and knows it to be true in substance and in fact, except the paragraph denying that Mr. Gibbon ever led the plaintiffs' attorney to believe the money would be paid, and that he believes to be true.

The defendants' attorney makes a second affidavit denying that Mr. Wilson had authority or permission from defendants or their attorney to make the agreement of the 17th of August, 1861, and asserting that the award was not served on defendants or their attorney, nor had they any knowledge of its contents or any notice of the publication thereof until it was too late to apply to the court last (*i. e.* Trinity) term to set it aside, and that judgment has been entered and execution placed in the sheriff's hands in this cause.

S. Richards, Q. C., and *Hector Cameron* shewed cause. The plaintiffs' attorney made an affidavit stating that immediately after the commencement of this suit, the defendants attorney instructed him to serve all papers in this suit on Mr. Adam Wilson, or on the firm of Wilson, Patterson & Beatty, of which firm Mr. Wilson is a member, and to treat him and his firm as the agents of him, the defendants' attorney, in consequence of the usual agent of the defen-

dants' attorney being retained on behalf of the plaintiffs. That Mr. Wilson and his firm acted throughout this suit as agents for the defendants' attorney, and received and served all papers and documents herein. That the award was made and published by the arbitrator herein, on the Saturday before last Trinity Term, and the plaintiffs' attorney having received notice on that day from the arbitrator that he had published his award, he served on the same day notice on Mr. Wilson that the award was published. That it was distinctly understood by both parties during the argument before the arbitrator that the award would be published before Trinity Term. That on the first or second day of Trinity Term the plaintiffs' attorney had a conversation with Mr. Wilson as to the award, when Mr. Wilson spoke in general terms of the contents of the award. That up to or about the 24th of October, 1861, plaintiffs' attorney had no intimation that the defendant meant to contest the award, but had been previously led to believe by conversation with the treasurer, and with the attorney of defendants, that they acquiesced in the award and would pay the amount, and that at the request of the attorney for defendants he delivered to him his bill of costs and affidavit of disbursements about the 1st of October. That Mr. Wilson acted as agent for the defendants' attorney, and as counsel for defendants throughout the whole case. That the arbitrator here was not requested to state any question of law for the opinion of the court, there having been merely a conversation whether he should be so requested. That after the evidence had been given and a long argument concluded, a discussion arose between the counsel and the arbitrator as to the authority of the latter, and the necessity for reserving any question of law. Mr. Wilson stated that the only question of law as to the first count that could be raised was in reference to the agency of Bosanquet & Co. That the arbitrator intimated that he would have to find as a fact that the said firm were the agents of the defendants alone, and such finding would virtually determine the suggested question of law, and from the evidence, the finding on the questions of fact necessary to raise the question of law must be in

favour of the plaintiffs. When Mr. Wilson suggested that if the plaintiffs' counsel would leave the whole question of costs to the arbitrator, and allow him to fix a time for the payment of the money awarded, he (Mr. W.) would be disposed not to raise any question of law, and after consideration for a day or two, the agreement altering the terms of the reference was arrived at; the only inducement for the plaintiffs' counsel to consent to alter the terms of the reference was to avoid further delay. That the defendants' attorney was not present at the trial, nor at any sitting of the arbitrator, nor at the argument of the demurrers, but Mr. Wilson attended at all the sittings of the arbitrator, nearly thirty, except two or three at the beginning, and the whole management of the case from the drawing of the pleas until the taxation of costs on the 24th of October, 1861, was entrusted to and conducted by Mr. Wilson.

Richards, Q. C., and *Hector Cameron* shewed cause, citing *Swinfen v. Swinfen*, 18 Com. Bench, 485, and 3 Jur. N. S. 1109; S. C. 1 Com. B. N. S. 364, and 5 H. & N. 890; *Thomas v. Harris*, 27 L. J. Ex. 353; *Chambers v. Mason*, 5 Com. B. N. S. 59; S. C. 4 Jur. N. S. 1037; *Hall v. Featherstone*, 3 H. & N. 284; *In re Hobler*, 8 Bea. 101; *Rees v. Waters*, 16 M. & W. 269.

R. A. Harrison, in support of the rule, cited *Wade v. Simeon*, 13 M. & W. 647; *Fernival v. Bogle*, 4 Russ. 142; *Hargrave v. Hargrave*, 12 Beav. 408; *Colledge v. Horn*, 3 Bing. 119; *Brooks v. Parsons*, 1 D. & L. 691; *In re Burt*, 5 B. & C. 668; *Hayward v. Phillips*, 6 A. & E. 119; *Potter v. Newman*, 4 Dow 504.

DRAPER, C. J.—The first question is, whether this application is not too late. The rule *nisi* was moved on the 4th day of Michaelmas Term (21st November) in the Practice Court returnable here. The award is dated the 24th August last. The following Monday, August 26th, was the first day of last Trinity Term. No application of any kind was made until the 24th of October, 1861, when a summons was obtained in Chambers to stay proceedings. This ap-

appears only from the statement of counsel in argument from some of the affidavits referred to in drawing up the rule *nisi*, being marked as filed in Chambers on the 24th October, 1861, and attached to the copy of award and other papers put in on moving for the rule *nisi*. The delay to move is accounted for on the part of the defendants, by statements contained in the two affidavits of Gibbons, the warden of the united counties, (the defendants,) and in two affidavits of the defendant's attorney, one of each, having been sworn the 21st October, 1861, and used on the application in Chambers; the others being sworn on the 16th and 18th November, respectively. The one first sworn by the warden, states that the award was not served on defendant's counsel until the 12th of September, 1861, nor had defendants any knowledge of its contents until it was altogether too late to set the same aside last (Trinity) term.

The first affidavit made by defendants' attorney states that the award was not served on defendants or their attorney, nor had they any knowledge whatever of the contents thereof until it was too late to apply to the court last (Trinity) term.

In his second affidavit the warden repeats his former statement, and adds (par. 16) that defendants had no notice whatever served on *them*; that such award was not made until after last term; nor were *they* aware of the publication of the award, nor had *they* any notice whatever thereof until after the period aforesaid.

And the second affidavit of the defendants' attorney swears that the award was not served on the *defendants* or their attorney, nor had they any knowledge whatever of the contents or any notice of the publication thereof until it was too late, &c.

There is a palpable inadvertence involving an apparent inconsistency in the manner in which the term "defendants" is used, as if they were individuals instead of being a corporation. It would have been more to the purpose to deny notice and knowledge on the part of those officers of the corporation, notice to whom would be notice to the "defendants." The second affidavit of the defendants' attorney is

inconsistent with the idea that in denying notice or knowledge to or on the part of the "defendants" he can refer to and include implied or legally imputed notice or knowledge, or he would not have stated that the award was not served on the defendants or their attorney, since service on him as their attorney would, for all purposes now under discussion, have been service on them; notice of publication or of the contents of the award to him would have been notice to them, and notice to, or service on, his duly authorised agent as the defendants' attorney would have been notice to, and service on, himself.

On the other side two affidavits are made by the plaintiffs' attorney, the first sworn on the 26th of October, the last on 29th November. In the first it is stated that the defendants' attorney and their treasurer within the last month "both led him to believe that the money would be paid on the 15th October as directed." That the defendants' counsel, meaning Mr. Wilson, was aware of the terms of the award within the first two days of Trinity Term, although a copy of the award was not then served, "but a notice of publication of the award was served on the defendants before the first day of" Trinity Term.—(par. 7). And further, (par. 9,) that Mr. Adam Wilson acted as agent for the defendants' attorney, and as counsel for the defendants. This affidavit was known to the warden when he made his second affidavit, as the 15th paragraph thereof shews, and must, I think, have been also known to the defendant's attorney. And yet in all the affidavits filed on behalf of the defendants, all reference to Mr. Wilson as agent for the defendant's attorney is most studiously avoided, not a word is said of any communication to or from him on the subject of his making the agreement of the 17th August, or of his being agent of the defendants' attorney, or of his having had notice of publication, or even being served with the award, though the warden swears the award was not served on the defendants' counsel until the 12th of September, 1861, (2nd affit. par. 11,) a fact not otherwise appearing on the papers before us, except by an endorsement on the copy of the award, which is attached to an affidavit of the defendants' attorney sworn the 10th

November, that such copy was not served until the 12th September, 1861, as appears by the memorandum thereof endorsed thereon by the counsel for the defendants.

The second affidavit made by plaintiffs' attorney states more fully that on the same day the award was made, he served Mr. Wilson with notice that the award was published. That Mr. Wilson, on the first or second day, knew generally the contents of the award, and that he acted as agent for the defendants' attorney. And (par. 2 & 3) that plaintiffs' attorney was told by defendants' attorney to serve all papers in the suit upon Mr. Wilson, or the firm of Wilson, Patterson & Beatty, of which Mr. Wilson is a member, and to treat him and his firm as the agents of the defendants' attorney in this suit, and that Mr. W. and his firm acted throughout this suit as agents for defendants' attorney, and received and served all papers and documents therein. And again, (par. 14) that defendants' attorney was not present at the trial or at any of the sittings of the arbitrator. And the whole management of the defendants' case from the drawing of the pleas until the taxation of the costs was entrusted to and conducted by Mr. Wilson.

From the manner in which Mr. Wilson's alleged want of authority to make the agreement of the 17th August is pressed upon us, I do not doubt that his character as agent of the defendants' attorney would have been repudiated if he had not filled that position. I conclude that Mr. Wilson especially, and his firm generally were agents in this cause for the defendants' attorney; and that they had notice of the publication of the award before Trinity Term. I doubt as little that if there had been any omission on Mr. Wilson's part duly to advise the defendants' attorney of the proceedings, we should have heard of it unless the matter was so entirely left to Mr. Wilson's management as to make this unnecessary. The very guarded and confined language in which the defendants' attorney denies notice or knowledge, fails to satisfy me that he was not informed by Mr. Wilson of the steps and proceedings taken in the cause, and I think justifies the conclusion that he had an actual as well as the imputed knowledge which arose from services on, and notice to, his agent.

Pleas.—1st. To the whole declaration, never indebted.

2nd. To the whole declaration, set-off.

3rd. To the whole declaration, payment.

4th. To so much of the declaration (*i.e.* of the first count) as charged the defendant with having, by the various means set forth, and by the negligence of the defendant, hindered and prevented plaintiffs from proceeding with, completing and finishing the works; that defendant did not hinder and prevent plaintiff in manner and form, &c., but that plaintiffs of their own wrong delayed the work.

5th. To so much of the declaration as charged defendant with having wrongfully caused the plans to be altered, and works and structures to be taken up and done in another and different manner, and wrongfully hindering, impeding, and delaying the works, not guilty.

6th. To so much of the declaration as charges the defendant with fraud, and fraudulently causing mismeasurement of the works, and wrong estimates, not guilty.

The plaintiffs joined issue on these pleas.

A verdict was taken for plaintiffs by consent, for £8,000, subject to the award of arbitrators, to whom all matters in difference in the cause was referred.

The arbitrators awarded (5thly) that the plaintiffs did not perform the works by the times specified in the contract of the 15th of December, 1854, but made default, and that the default continued for several months after the time in that contract mentioned.

They found (7thly) that the amount paid by defendant to plaintiffs, before the commencement of this suit, exceeded the amount certified by the final certificate of the engineer, and the bonus of \$10,000 in addition thereto, (after deducting the guarantee fund of \$24,000,) by the sum of \$3749.93. That before the commencement of this action defendant had not paid the full amount of the final certificate, and the bonus of \$10,000, including (that is, and also) the guarantee fund of \$24,000. But that on the payment of \$20,000, a payment made by defendant after action brought, defendant had then paid enough to cover the whole amount of the final certificate, and the bonus, less \$250.07. And they awarded

the issue on the plea of payment to the first count, to be entered for plaintiffs for \$250.07, if the court should so order, or that a verdict on that issue should be entered for defendant, if the court should so order.

They found (9thly) that as to various items particularly enumerated by them, and claimed by plaintiffs from defendant, above the amount certified by the final estimate, the defendant was never indebted to the plaintiffs, and that defendant was and is indebted to plaintiffs in certain other items, also particularly set out, to which items defendant's counsel had objected, and on which they specially certified their finding, for the review of the court, which items amounted to \$8227.73. And they awarded that the verdict be reduced, and a verdict entered for plaintiffs for \$250.07, on the issue on the plea of payment to the first count, if the court should be of opinion that the verdict should be in favour of plaintiffs, and for the sum of \$8227.73, the amount of the last mentioned items, if the court should be of opinion that the plaintiffs are entitled to recover in this action, regard being had to the pleadings, the contracts, the defendant's objections, and the matters specially found; and if the court should be of opinion that plaintiffs were not entitled to recover in respect of any such items, or that the verdict should in law be entered for defendant, then they awarded that a verdict be entered for defendant in such manner as the court should direct. And as to the issue joined on the first plea, they awarded that the verdict be entered for plaintiffs or defendant, as the court should direct, on consideration of the facts and circumstances.

As to the issue on the 2nd plea, (set-off,) they found that plaintiffs were not indebted to defendant as in that plea alleged.

As to the issue on the 3rd plea, (payment,) they awarded that the issue should be entered for plaintiffs or defendant as the court should direct.

As to the issue on the 4th plea, they awarded that the verdict should be entered for plaintiffs if the court on consideration of the circumstances stated as item No. 10, should

be of opinion that the plaintiffs were entitled to recover for that item; otherwise for defendant.

As to the issue joined on the 5th plea, they awarded that the verdict should be entered for the defendant.

As to the issue joined on the 6th plea, they awarded that the verdict should be entered for the defendant.

And they awarded that each party should pay their own costs of the reference and arbitration. And that the costs of the arbitrators and of the award should be paid one-half by each party, and they fixed those costs at \$2,520.

The case was argued by *O'Reilly*, Q. C., for the plaintiff, and *Gwynne*, Q. C., for the defendant.

DRAPER, C. J.—A doubt might arise, as the first count is framed, whether the plaintiffs are seeking damages for breach of contracts or for the alleged wrongful and fraudulent acts of defendant, to which the plaintiffs would attribute their own non-fulfilment of stipulations and conditions to be by them fulfilled and kept. The defendant, by pleading never indebted to this count, treats it as founded upon contract, and I think rightly. The charges of *wrongful* hindrance, of *wrongful* charges in the plans and places of construction, of *wrongfully* compelling the pulling down and re-construction of part of the works, and of *fraudulently* procuring false or incorrect estimates to be made, appear to me to have been introduced into the declaration to prevent defendant from setting up, by way of answer, that the plaintiffs had not fulfilled their contract as to time, and had been paid according to estimated quantities, and are therefore to be viewed rather as matter of inducement to, than as part of the substance of plaintiffs' claim. The plaintiffs charge *wrongful* hindrance and delay to avoid the effect of those parts of the contract which contemplate hindrance and delay on the part of defendant, and make provision for it; as the charge of fraud in obtaining the monthly and final estimates is obviously designed to give the go-by to those parts of the contract which make the decision of the engineer on those matters conclusive on both parties. The language heretofore

used in the declaration, such as that "defendant contriving and fraudulently intending craftily and subtly to deceive and defraud the plaintiffs in this behalf," is as strong as the charges in this declaration of wrongful and fraudulent acts advanced against defendant. Such language was used in actions on contracts and promises, and was not treated as even requiring a traverse. Possibly the plaintiffs' pleader may have anticipated some advantage, if they were not traversed in this declaration. But they have been pleaded to, and the issues rightfully, as we must assume, decided in the defendant's favour.

If therefore the plaintiffs were claiming damages because of these alleged wrongful and fraudulent acts, the award rejects such claims, and all that remains under the first count must be claimed under the two contracts, treating the defendant as having failed to pay the plaintiffs what they were entitled to, under the provisions thereof.

The first contract required the works to be completed by the 10th of November, 1854. It provided that all defendant's payments should be made upon the written estimate of the engineers in charge of the works, to be given in monthly. It authorised defendant to retain fifteen per cent. out of each estimate, until \$6000 was thus retained, and to hold that sum until the completion of the works, to the satisfaction of defendant, and that such sum should be paid to plaintiffs, with the last instalment of the price, within ten days after the completion of the works, to the satisfaction of the defendant, and of the chief engineer of the railway company, and in accordance with the contract. And that on the completion of the works, a final estimate should be made, the previous estimates being treated as merely approximate. It was also agreed that in the event of the plaintiffs failing to fulfil their contract, they should forfeit all right to the percentage so retained. It was further agreed that the defendant might alter the course and levels of the railway to any extent rendered necessary by any change in the line desired by the railway company, and that defendant might also alter the drawings, and substitute embankment for trestle work, or piling for embankment, with-

out giving plaintiffs any claim for damages, the plaintiffs only to be paid for the quantities of work according to the schedule of prices. Provision was also made for the suspension of any part of the work, in which event an extension of time was to be given to plaintiffs, sufficient in the judgment of the chief engineer to enable them to complete the work so suspended, but the plaintiffs were to have no claim for extra compensation. The second contract, preserving all the other stipulations as to the performance of the work, &c., &c., intact, changed the time for the completion thereof, making also a provision for the further extension beyond the newly fixed dates, in case of delays arising from the defendant or the railway company, similar to the corresponding provision in the first contract. The plaintiffs released defendant from all claims for extra work done in connexion with the works under the first contract, or by reason of any difference in the material excavated, or to be excavated, and agreed that no claim should be made on account of detention arising from the plaintiffs not having been put in possession of the right of way, and that the sum of money thereafter mentioned should be considered in full for extra haul, and for damages sustained by plaintiffs by reason of the non-delivery of plans and bills of timber and iron. And defendant, in consideration of these agreements, covenanted to pay plaintiffs, on the completion of the works at the last mentioned times, but in all other respects according to the first contract, the sum of £2500, as a bonus and addition to the contract prices.

The second contract therefore left the conditions precedent to the plaintiffs' right to be paid, which were contained in the first contract untouched, and it makes no alteration as to the forfeiture of the percentage retained, in the event of failure to complete the works within the limited times. The arbitrators have expressly found the plaintiffs' failure in this respect, and the inevitable consequence seems to be that the defendant was not indebted to the plaintiffs on the contracts, and that on the pleadings and finding, the defendant should have a verdict entered for him on all the issues on the first count.

But the performance and completion of the work, subsequently coupled with the acceptance by the defendant, seems to me to entitle the plaintiffs to recover on the common counts. The engineer has made his final estimate, including the work subsequently performed, and it has been acted upon by the defendant, as the payment of \$20,000 sufficiently shews. The verdict should therefore be entered for the plaintiffs on all the issues on the common counts, and it only remains to consider the disputed items. In deciding upon these, I consider the provisions of the two contracts generally to remain in force, and to afford a safe guide to us, except as to time. In deciding thus in the plaintiffs' favour, however, I hold that the provisions of the two contracts are to be conformed to, as far as and in all such cases in which they continue to be fairly applicable, and in deciding upon the items of the award on which questions have been raised, I think the parties bound by those provisions.

As to the items numbered 20, 24, 25, 33, 34, 36, 39, 40, 41, 49 and 58, they are in effect conceded on the part of the defendant.

I think the items numbered 2, 4, 9, 10, 13, 15 and 17, inadmissible. One or more, or all the following objections are respectively applicable to them. 1st. That they are for work for which a price is fixed by the contract and schedules of prices, in which case that price must govern. Or they are for work charged by the day, and the contract of the 2nd of December, 1853, excludes that mode of charging. Or they are rested on the ground of hindrance and delay on defendant's part, causing increased expense or loss to the plaintiffs, while the contracts expressly provide against this charge, and the arbitrators have negatived wrongful hindrance and delay and fraud. Or lastly, the engineer's final estimate does not include or sanction these charges, and the arbitrators have negatived any charge of fraud or improper conduct in the engineer in framing the estimates. The amount of these items is \$3,100.52.

I think also that item No. 28, \$511.94, item No. 31, \$10.08, and item No. 53, \$60, amounting together to

pleting it, viz., on the 16th of December, 1854, by certain articles of agreement made between plaintiffs and defendant, after reciting the former indenture, and that it had been agreed between them that every stipulation, covenant, and agreement in that indenture should remain in force, and not be held to be waived or discharged by the execution of the new agreement, except where it was particularly expressed, and that every covenant in the new agreement should be held as respects the plaintiffs as if such covenant had been originally inserted in the first indenture in place of the covenant for which it was substituted; the plaintiffs promised that they should in all respects and subject to every covenant in the first indenture contained, execute the works on the said sections 3 & 4, at the days and times thereafter specified, that is to say, one certain part by the 1st of March then next; another certain part by the 1st of April then next; another certain part by the 15th of May then next, and the remainder by the 1st of June then next. And that if plaintiffs should not before the 1st of January then next be authorized by defendant's agent to proceed with the works on the garrison reserve, then the plaintiffs should be allowed an extension of time beyond the said 1st of June for completing the remaining portion, day for day. And that if from any accident the works on the garrison reserve should be unavoidably delayed, plaintiffs should be allowed such further extension of time as should appear just to the chief engineer. And in consideration of a covenant of defendant thereafter contained, plaintiffs released to defendant all claims for any extra work theretofore done in connection with the first indenture, it being understood that the contract prices in the first indenture were in full of all works then done, or to be done, under the said contract. And that no claims should be made by plaintiffs by reason of any detention arising from the plaintiffs not having been theretofore put in possession of the right of way; and the sum mentioned in the covenant thereafter contained should be taken in full for extra haul in the construction of roads, and of any claim for damage theretofore incurred by plaintiffs by reason of non-delivery of plans, and bills of timber and iron. And defendant promised

that he would, on completion of the work in the first indenture described, at the times in the articles of agreement mentioned, pay plaintiffs £2500 as a bonus, in addition to the contract prices. And by the articles of agreement, after reciting, &c., it was agreed that the ballasting should be executed by defendant, and that plaintiffs should afford him every facility to enable defendant to proceed therewith.

Averment, that plaintiffs immediately proceeded with the performance of the contract, and that they were then prepared to execute and complete the same according to the conditions and specifications, &c., and to the satisfaction, &c., within the period limited, whereof defendant had notice. And that after they were so ready, and had commenced, and within the period limited, defendant in the exercise of the power to him in that behalf given, on five occasions, caused to be suspended the execution of the works so to be performed by plaintiffs, whereby plaintiffs were hindered and delayed in the execution of the work, to wit, for three months, and plaintiffs became entitled to an extension of time for doing the works. And that plaintiffs were not on the 1st January next, after the date of the articles of agreement, nor for three months afterwards, authorised by defendant's agent to proceed with the work on the garrison reserve, by means whereof plaintiffs became entitled to an extension of time for completing that portion of the work. And that at the time of entering into the articles of agreement a large portion of the line of the railway was not located, and the right of way was not obtained and ready for the occupation of the plaintiffs. And the said portion of the line of the railway, through the negligence and default of the defendant, was not located, and the right of way was not obtained, for three months thereafter, and after the said portion of the line was located, and the right of way obtained, and before the expiration of the time appointed by the articles of agreement for completing the said works, and after a great portion of the works had been done by plaintiffs, the course and level of the railway and the grades, curves, and other parts thereof were altered by defendant, and the railway and the works and structures belonging thereto were required by de-

defendant to be constructed, and were constructed by plaintiffs at different places, and on different grades, &c., and otherwise differently from what were required by the indenture and articles of agreement and the plans, &c., whereby the work to be done by plaintiffs was increased in quantity, and rendered more difficult and expensive, and required a longer time, and the plaintiffs thereby were not only wrongfully hindered, *s. s.* three months in constructing the railway and the works, but necessarily expended, *s. s.*, £10,000 beyond what would otherwise have been necessary for that purpose. And that after making the articles of agreement, and before the time therein limited for completing any part of the works thereunder, and after plaintiffs had executed other portions thereof, in accordance with the plans, and under the directions of the defendant's agent, and to the satisfaction, &c., defendant wrongfully caused the said works and structures, and the plans and drawings to be altered, and the works to be taken up, and the works and structures to be executed by plaintiffs in a different manner, and a portion of the structures to be placed at different places, whereby plaintiffs were further hindered in doing the works, *s. s.*, for three months.

Further averment, that after entering into the agreement, and before the time limited, &c., and when plaintiffs were ready to execute the work, defendant, by his agents, unnecessarily and wrongfully hindered and delayed plaintiffs from making and executing the cuttings, &c., agreed to be done by plaintiffs, *i. e.*, for three months, by means whereof plaintiffs were compelled to do the same at more inconvenient seasons of the year, and at great additional expense. And that by reason of the several suspensions, &c., plaintiffs were unavoidably and wrongfully hindered from performing the contract within the time appointed. And by means of the wrongful hindrances caused by defendant's agents and servants, plaintiffs were wrongfully put to great loss, trouble, expense, &c., and were forced to expend, *s. s.*, £20,000 in executing the works, beyond what they would otherwise have expended. That nevertheless, at defendant's request, and more than ten days before the commencement of this suit, and within a reasonable time after entering into the

articles of agreement, they provided all materials, &c., and constructed and completed all grubbing, &c., in accordance with the plans and specifications, and under the instructions of defendant and his agents, on the said sections 3 & 4, and completed the said work in all respects in accordance with the indenture and articles, and to the satisfaction of the defendant and of his agent, and of the chief engineer, so as to render the railway fit for public traffic, and defendant accepted and received the same as completed from the plaintiffs.

And although the engineer in charge of the work did monthly give in certain written estimates thereof, yet such estimates were not, nor was any of them, true and correct, but false, erroneous, and incorrect, and did not specify the amount of the work done, and of the materials provided monthly, but only a small part thereof; and defendant wrongfully and fraudulently procured the estimates to be made and given untruly. And that though after the completion of the work a final estimate was made purporting to specify truly the whole of the work done and materials furnished, yet such final estimate was false and incorrect, and did not specify truly, &c.; and that defendant wrongfully and fraudulently caused the said final estimate to be made, and given untruly and incorrectly, and to specify only a small part of the works and materials, and that no correct monthly or final estimate was ever made, specifying truly the amount of work done, and materials provided by plaintiffs, although plaintiffs requested defendant and the engineer, &c. Averment, that more than 10 days before the commencement of this suit the sum of £10,000 was due from defendant to plaintiffs, for work done and materials provided under the indenture and articles of agreement, as well as the sum of £2,500, mentioned in the articles of agreement, as a bonus, whereof defendant had notice, yet defendant has not paid the same; and for money payable by defendant to plaintiffs, for goods sold and delivered, and for work done and materials provided, and for money received by defendant for plaintiffs' use; and for interest, and for money due on an account stated.

Plaintiffs claim £100,000.

the county town of Bruce, and that the provisional council of the county had petitioned for an act to enable the municipal electors of the county to select a county town, that six places might be submitted to the electors, (naming the places) and that the place receiving the greatest number of votes might be the county town; that the inhabitants of the county petitioned that the proclamation appointing Walkerton might be avoided, but that the selection should be left to the Governor in Council; that the provisional council had refused to pass a by-law to raise the necessary funds for the erection of the county buildings at Walkerton, then proceeds to enact that the proclamation shall be rescinded. That the selection shall be left to the Governor in council. That each place desiring to do so shall present its claims in writing to the Governor in council. That the provisional council shall, before the Governor in council acts, vote the necessary supplies for the county buildings, and pass a valid by-law for raising the same.

The passing of the by-law is asserted and not denied, but it is objected to as illegal, for it does not make a proper provision to raise the money. As to this we are informed that there has been a mistake in bringing before the court a by-law to impose a rate of one-fifth of a penny in the pound whereas there has been a by-law passed to raise one-fourth of a penny in the pound.

Then came the proclamation of the 8th November, 1880, re-appointing Walkerton the county town, with the subsequent proceedings detailed in the affidavits.

Now, it is abundantly obvious that there is great difficulty in the provisional council, and I have no doubt great disinclination, to carry into effect the erection of the proper public buildings, and so practically to establish the county town at Walkerton. In view of these difficulties I think the court should be careful only to grant the writ prayed for on clear grounds establishing that in some particular or particulars they have refused to discharge the duty imposed on them by law, having been properly required so to do. Now, the only act which they have actually refused to perform has been to pass the resolution set out in the clerk's

affidavit. I certainly am not prepared to grant a mandamus to them to pass that resolution, for when they had obeyed that command the real difficulty would remain untouched. Nor am I called upon to devise the mode in which proceedings should be taken. The raising sufficient funds would appear to be a necessary step, before they can purchase a site or enter into a contract to build. I do not see that any demand has been made either upon the council or upon any officer having authority for this purpose, and though they may do all that they can to borrow, it is not a certain consequence that they will find anyone to lend. But while there are no funds available, I should deem it premature to order their expenditure. And if a specific demand had been made on them to purchase or contract, if they could truly answer that they had been unable to raise money, I do not think that could be treated as a refusal.

In my view the court should have distinctly before them, what it is that has been demanded, how the demand has been made, and how it has been answered, before granting a mandamus, for I apprehend the command in the writ should be to do the act or acts refused, and therefore it is indispensable we should know what they are.

I have not been able to free my mind from doubts whether an application of such a character as this is, belonging among other things to the administration of public justice, should proceed from a private individual, merely in his capacity of a resident ratepayer in Walkerton, and so interested in the location of the county town in that village; nor am I satisfied, apart from the want of evidence of direct refusal, which would put the matter on a different ground, that the delay which has taken place affords evidence that it is merely colourable. A long continued delay, doing nothing, attempting nothing, and obstructing those desirous of acting might well establish against the provisional council the charge of wilful neglect of a duty imposed, and would certainly deprive them of all answer, when they persisted in such a course after specific demand. At present I think enough is not shewn to warrant our granting the writ.

favour of the plaintiffs. When Mr. Wilson suggested that if the plaintiffs' counsel would leave the whole question of costs to the arbitrator, and allow him to fix a time for the payment of the money awarded, he (Mr. W.) would be disposed not to raise any question of law, and after consideration for a day or two, the agreement altering the terms of the reference was arrived at; the only inducement for the plaintiffs' counsel to consent to alter the terms of the reference was to avoid further delay. That the defendants' attorney was not present at the trial, nor at any sitting of the arbitrator, nor at the argument of the demurrers, but Mr. Wilson attended at all the sittings of the arbitrator, nearly thirty, except two or three at the beginning, and the whole management of the case from the drawing of the pleas until the taxation of costs on the 24th of October, 1861, was entrusted to and conducted by Mr. Wilson.

Richards, Q. C., and *Hector Cameron* shewed cause, citing *Swinfen v. Swinfen*, 18 Com. Bench, 485, and 3 Jur. N. S. 1109; *S. C.* 1 Com. B. N. S. 364, and 5 H. & N. 890; *Thomas v. Harris*, 27 L. J. Ex. 353; *Chambers v. Mason*, 5 Com. B. N. S. 59; *S. C.* 4 Jur. N. S. 1037; *Hall v. Featherstone*, 3 H. & N. 284; *In re Hobler*, 8 Bea. 101; *Rees v. Waters*, 16 M. & W. 269.

R. A. Harrison, in support of the rule, cited *Wade v. Simeon*, 13 M. & W. 647; *Fernival v. Bogle*, 4 Russ. 142; *Hargrave v. Hargrave*, 12 Beav. 408; *Colledge v. Horn*, 3 Bing. 119; *Brooks v. Parsons*, 1 D. & L. 691; *In re Burt*, 5 B. & C. 668; *Hayward v. Phillips*, 6 A. & E. 119; *Potter v. Newman*, 4 Dow 504.

DRAPER, C. J.—The first question is, whether this application is not too late. The rule *nisi* was moved on the 4th day of Michaelmas Term (21st November) in the Practice Court returnable here. The award is dated the 24th August last. The following Monday, August 26th, was the first day of last Trinity Term. No application of any kind was made until the 24th of October, 1861, when a summons was obtained in Chambers to stay proceedings. This ap-

appears only from the statement of counsel in argument from some of the affidavits referred to in drawing up the rule *nisi*, being marked as filed in Chambers on the 24th October, 1861, and attached to the copy of award and other papers put in on moving for the rule *nisi*. The delay to move is accounted for on the part of the defendants, by statements contained in the two affidavits of Gibbons, the warden of the united counties, (the defendants,) and in two affidavits of the defendant's attorney, one of each, having been sworn the 21st October, 1861, and used on the application in Chambers; the others being sworn on the 16th and 18th November, respectively. The one first sworn by the warden, states that the award was not served on defendant's counsel until the 12th of September, 1861, nor had defendants any knowledge of its contents until it was altogether too late to set the same aside last (Trinity) term.

The first affidavit made by defendants' attorney states that the award was not served on defendants or their attorney, nor had they any knowledge whatever of the contents thereof until it was too late to apply to the court last (Trinity) term.

In his second affidavit the warden repeats his former statement, and adds (par. 16) that defendants had no notice whatever served on *them*; that such award was not made until after last term; nor were *they* aware of the publication of the award, nor had *they* any notice whatever thereof until after the period aforesaid.

And the second affidavit of the defendants' attorney swears that the award was not served on the *defendants* or their attorney, nor had they any knowledge whatever of the contents or any notice of the publication thereof until it was too late, &c.

There is a palpable inadvertence involving an apparent inconsistency in the manner in which the term "defendants" is used, as if they were individuals instead of being a corporation. It would have been more to the purpose to deny notice and knowledge on the part of those officers of the corporation, notice to whom would be notice to the "defendants." The second affidavit of the defendants' attorney is

HAGARTY, J.—In my opinion the facts laid before us on this application are wholly insufficient to warrant our interference. Assuming that we have the right to interpose by mandamus in such a case, it appears to me that the demand alleged to have been made was defective.

Loose conversations with individual members of a corporation or opinions as to their apparent determination not to proceed in any particular matter wholly fail to satisfy my mind.

But apart from all technical objections, I feel the gravest doubts as to the propriety of proceeding by mandamus on such a state of facts. I should be always unwilling to interfere with the proceedings of a deliberative body, holding their seats by a popular vote, removable every year, naturally reflecting with reasonable fairness the opinions of the ratepayers of the county on a matter in which it is clear the desire of the legislature was to satisfy those who almost alone were and are interested in the separation of the counties. Outside the county, its existence or non-existence as a separate judicial municipality is a matter of trifling importance. The same may of course be said of the erection or non-erection of county buildings. The Governor-General has, it is true, finally named a place for the county town, but I am hardly prepared to hold it to be a wise exercise of the forms of this court to force the rate-payers by legal process to hasten the expenditure of a large sum of money on the county buildings. They now have full power in their own hands so to do when they please. I cannot satisfy myself that the provisional council are so clearly refusing to perform a well-defined legal duty, as to warrant a mandamus on the application of an individual rate-payer to force them to its performance.

Per cur.—Rule discharged.

THE COMMERCIAL BANK OF CANADA V. WILSON.

Bill of Exchange—Surety—Assignment—Reservation of rights against sureties—Discharge—Pleading.

Declaration upon four bills of exchange of £500 each, drawn by R. H. & Co., upon one J. C., payable to and endorsed by defendant.

The defendant pleaded, 1st., payment. 2nd., an assignment made by J. C. to one T. P., for the benefit of his creditors with plaintiffs' assent and concurrence, and that T. P., with the consent of J. C. and his other creditors, conveyed and assigned certain property to the plaintiffs, and plaintiffs accepted such conveyance and assignment in full satisfaction of the causes of action in the declaration. The plaintiffs replied upon equitable grounds that the property assigned was not equal to the whole of J. C.'s indebtedness to plaintiffs, and that plaintiffs accepted the same on account of such indebtedness with defendant's assent, and that the proceeds of such estate are still applicable to pay a portion of the causes of action against defendant, to wit, £500, with a *nolle prosequi* as to that portion; and defendant promised to pay the residue of defendant's indebtedness to plaintiffs over and above the said £500.

Upon demurrer, *held*, that the executing of an assignment by the holder of a bill without a special reservation of rights as to sureties, discharges them, and that the pleadings shewed it was the plaintiffs' duty duly to administer the assets of J. C. in their hands to be applied upon the bills declared on, and until they had done that no cause of action accrued against the defendants.

For all that was shewn by the pleadings, the assets in plaintiffs' hands might cover the bills sued upon, and therefore the replication was bad.

The declaration contained four counts each on a bill of exchange for £500; three dated in February, and one in March, 1857, payable three months after date, drawn by R. Holt & Co., upon one J. Coleman, in favour of defendant, endorsed by defendant to plaintiffs, and duly presented for payment and dishonoured.

Common money counts.

Pleas.—1st. Payment of the bills by Coleman the drawee.

2nd. That after plaintiffs became, and while they were, holders of the bills and before the commencement of this suit, plaintiffs being creditors of Coleman in respect of these bills and of other debts became parties, or gave their assent, to certain indentures whereby Coleman conveyed all his estate and effects, real and personal, to one Thomas Paton upon certain trusts, and chiefly upon trust to collect in moneys due to Coleman, and to sell and dispose of the estate and effects, and apply the proceeds in payment of the claims of the creditors of Coleman rateably and without priority; and that afterwards and before the commencement of this suit, Paton, with the assent of Coleman, and of the other creditors of Coleman, by deed assigned to plaintiffs certain

portions of the personal estate and effects, and assured and conveyed to such uses as plaintiffs directed certain portions of the said real estate, and the plaintiffs accepted such assignment, conveyance and assurance, in full satisfaction and discharge of their claim as creditors of Coleman, including the causes of action in the declaration mentioned.

Replication to both pleas on equitable grounds, that both pleas relate to the same matters of defence, being set up in the first plea as payment, in the second as satisfaction and discharge. That the whole of the real and personal estate alleged to have been assigned to the plaintiffs was not equal to plaintiffs' lawful claims against Coleman, including the bills of exchange declared upon.

That between themselves and defendant, they only accepted such real and personal estate and effects on account of said indebtedness of Coleman, including that mentioned in the declaration, and that such real and personal estate then was, and still is, *applicable* to pay a portion of plaintiffs' causes of action against defendant, to wit, £500, (as to which portion plaintiffs will not further prosecute their suit.) That it was the understanding and agreement between plaintiffs and defendant, that such estate and effects only should be and were accepted by plaintiffs upon such terms.

That such agreement has been partially performed both by plaintiffs and defendant to this extent, that plaintiffs on the faith thereof accepted the said estate and effects, and the defendant assented to their so doing, and ratified the plaintiffs' acts in that behalf, and promised to pay the residue of the defendant's indebtedness to plaintiffs, over and above the selling value of such estate and effects. Wherefore plaintiffs say that as to such residue of the causes of action in the declaration mentioned, beyond what plaintiffs will not further prosecute for, unless as in the replication above mentioned, the defendant in the manner in this replication, and in the replication mentioned, of his own wrong and without the cause in the second plea alleged, broke the residue of his promises, and neglected to pay the residue of the moneys in the declaration mentioned.

Demurrer by defendant.

Freeman, Q. C., for the demurrer, cited *Hickey v. The Anchor Ass. Co.*, 18 U. C. Q. B. 433; *De Pothonier v. De Mattos*, 1 E. B. & E. 461.

Richard Martin, for the plea, cited *Yates v. Aston*, 4 Q. B. 182; *Emes v. Widdowson*, 4 C. & P. 151; *Jones v. Broadhurst*, 9 C. B. 173; *Bell v. Banks*, 3 M. & G. 263; *Solly v. Forbes*, 2 B. & B. 38; *Willis v. Castro*, 27 L. J. C. P. 243; *Vorley v. Barrett*, 1 C. B. N. S. 225.

DRAPER, C. J.—Coleman is stated in the declaration to have been the person on whom these bills were drawn, and defendant is stated to have been the payee and endorser. The replication admits that a portion of certain real and personal estate which had been conveyed by Coleman to a trustee for the benefit of Coleman's creditors, was, by the authority of Coleman, and the consent of his creditors, conveyed by the trustee to, and was accepted by the plaintiffs in full satisfaction and discharge of their claims as creditors of Coleman as well on these bills as on all other demands against him.

A release to the acceptor *per se* discharges the other parties to the bill. [*Cheetham v. Ward*, 1 B. & P. 630; *Nicholson v. Revill*, 4 A. & E. 675.] If the holder of a bill signs a composition deed as to the debt of the principal debtor, without expressly reserving his rights against the sureties, they are discharged.

The plea does not set up merely a partial payment by the drawee, but asserts also that the plaintiffs discharged him. The replication seeks to avoid this by alleging an understanding and agreement between plaintiffs and defendant, not averred to have preceded, or to have been even contemporaneous with the *discharge*, though it may be inferred from the statements in the replication to have preceded the actual receipt of the estate and effects which had been conveyed by Coleman to his trustee, and by that trustee to plaintiffs.

The replication does not seek to "make void" the plea altogether. It admits that the property conveyed to the plaintiffs "*when properly administered*," was, and still only is "*applicable*," (qu. *available*) to pay a portion of plaintiffs'

causes of action, s. s., £500, thereof, and that such property was only accepted by plaintiffs on these terms, that is, as I understand, properly to administer the same, to apply whatever, on such administration, should be found available to satisfy these bills, and that defendant promised to pay the residue. For all that appears, the property remains in plaintiffs' hands in specie, not "administered" or disposed of, and putting their own value on it, they treat defendant's promise as continuing *pro tanto*, the cause of action on the bills against him. It is true they fix the sum applicable in part payment of the bills, under a *videlicet*, which for the purposes of pleading is well enough, but it is, if I mistake not, a novelty in pleading to enter a *nolle prosequi* for a part of the money sued for, to wit, £500. I do not see what right they have, on their own shewing, to sue the defendant until they have applied the property received by them as far as it will go in payment of the bills; or to assume how much the estate and effects transferred to them will, when "properly administered," produce. If enough should be produced to satisfy Coleman's debts to plaintiffs in full, they have no claim on defendant, either on the bills or his new promise. I do not wish unnecessarily to give a final opinion as to whether taking the replication to be otherwise good, it does not shew a new agreement founded on good consideration, on which alone plaintiffs can sue, and if so, it is a departure from the declaration.

If I were to adopt Lord Campbell's language in *De Pothonier v. De Mattos*, (E. B. & E. 466,) as a complete definition of an equitable replication, the plaintiffs would be, on that ground, also out of court. He says that the object of sec. 85, of the English C. L. P. Act, 1854, "was to allow an equitable replication to a plea which sets out facts that can be answered on equitable grounds, such a plea in fact as the court would, before the statute, have set aside in the exercise of what was called its equitable jurisdiction." We certainly could not have set aside this second plea, for there is nothing inequitable in it; but I do not understand the observation to be intended as a definition of the only case in which a replication on equitable grounds was allowable. At

the same time it is well to remember that the statute allows plaintiffs to reply to a plea "facts which *avoid* such plea upon equitable grounds."

Now here the truth of the second plea is not denied. The facts stated, are a good discharge of the cause of action sued upon, and the attempted answer is a new agreement and understanding obviously made long after the breach assigned in the declaration. I fail to discover on what equitable grounds this agreement and understanding avoids the plea. If this be a new agreement and promise, it will not support the declaration, and it is not averred to have formed part of the arrangement pleaded.

Then as to the conclusion of this replication, *de injuria, &c., absque residuo causæ*. This form of replying is not much in use now in actions of contract, but it never was admissible as an answer to a plea of accord and satisfaction, such as this, for it is a plea in discharge, neither excusing nor justifying defendant's non-payment of the bill.

I think there should be judgment for the defendant.

Per cur.—Judgment for defendant.

MORSON V. HUNTER.

*Covenant.—Assignment of—Liability of assignee upon default of covenantor
—Damages—Pleading.*

The declaration claimed the sum of £1500, being the amount secured by mortgage, made by one Barton to defendant, and assigned to him with a covenant in the assignment that defendant should be personally liable for the due payment of all the moneys, and performance of the matters and things stipulated in the mortgage in case of any deduction, defalcation or abatement. Breach, that Barton did not pay the £1500 on the days appointed, but made default, and that defendant has not fulfilled his covenant.

The defendant, besides pleading *non est factum*, pleaded pleas denying his indebtedness, except as to all moneys remaining due at the time of the assignment, and also after the assignment, but before the 25th December, 1860, and demurred to the declaration denying his liability merely on Barton's default, without shewing any means taken to recover the amount.

Held, that the declaration was good, the assignment as stated in the declaration being large enough to pass all the debt secured by the mortgage, and it was not shewn to be in any part paid.

2nd. That the defendant's covenant bound him to pay all moneys secured by Barton upon his, B.'s, default.

3rd. That the breach claimed no more than the plaintiff might possibly be entitled to upon the assignment and covenant.

The declaration stated that one Barton, by deed dated the 24th December, 1855, conveyed to defendant certain lands

in fee subject to a condition that if Barton paid to the defendant £1,500 without interest, as follows, i. e., £25 at the expiration of every successive three months from the date until the 24th of December, 1860, when £1025, the residue of the said sum of £1,500, would become payable, then the same should become void, and Barton covenanted to pay the money according to that condition. And defendant by an assignment dated the 16th of March, 1857, sold to plaintiff his right in law and equity to the land mentioned in the mortgage and the money secured thereby, and the interest to accrue thereon, and defendant covenanted that he should be personally liable and bound to plaintiff for the due payment and performance of all the sums, matters, and things stipulated in the mortgage, in case of any deduction, defalcation, or abatement out of the same.

Averment, that Barton did not pay the £1,500 on the days appointed, but made default. That defendant has not performed his covenant nor paid to plaintiff on the default of Barton the said sum of £1,500.

Pleas.—1. *Non est factum* to the assignment.

2. As to all the moneys which became due before the assignment, that they were duly paid to defendant, and that at the time of the assignment none of the moneys which had before then become due were in arrear.

3. As to all the moneys which became due after the assignment and before the 24th December, 1860, that Barton duly paid them to plaintiff as they respectively became due.

And defendant demurred to the declaration, alleging that he was not liable merely because the mortgagor Barton has made default in payment, and it was not shewn that there was any deduction, defalcation, or abatement, nor that any attempt has been made to enforce payment from the mortgagor, or by proceedings against the mortgaged land; and that at most defendant's covenant only extended to payment of the mortgage moneys accruing due after the assignment, and the declaration did not shew default as to payment of such moneys, but stated generally that the £1,500 had not been paid. The plaintiff took issue on the first

plea. He entered a *nolle prosequi* as to all those parts of the claim stated in the declaration which are covered by the second and third pleas, and joined in the demurrer to the declaration in the usual form.

The demurrer was argued by *Richards, Q. C.*, for the defendant, and *Spencer* for the plaintiff.

DRAPER, C. J.—This demurrer unnecessarily contains parts of the pleadings and subsequent proceedings.

It has been strenuously urged for the defendant that the breach charging that Barton paid no part of the £1,500 is too large. It is quite true that according to the terms of the mortgage at the date of the assignment (16th March 1857) only four payments of £25 each were due, and another would shortly become so. But the assignment extended not merely to all moneys to become due on the mortgage thereafter, but to all moneys secured thereby. And if in fact nothing had been paid by Barton at the date of the assignment, the £1,500 would have passed to the plaintiff, and if his construction of the covenant be correct, the defendant would have been liable for it as a defalcation upon Barton's part. The breach may be larger than the facts warrant, but a pleading is not vitiated because more is claimed than can be sustained in proof, and as on this demurrer we must assume the statement true, then all it amounts to is, that the defendant's covenant is treated as extending to the whole sum of £1,500, because the whole sum is assigned and is all unpaid. Whether that is the proper construction of the defendant's covenant is another question, but if it be, I do not see why the breach is too large, unless it could be maintained that on this declaration the plaintiff must recover £1,500 or nothing. But it is further urged that the defendant's covenant means no more than that the mortgage is a good, valid and binding security for what remained due at the date of the assignment, and that could only be what should remain due; in other words, that the instalments past due were not in contemplation, and as to those to come, the defendant did not covenant to pay them, but that

the mortgage, with the covenants therein, were all good, valid and binding to secure accruing payments, and we were pressed with a criticism which I fear I did not fully appreciate, on the meaning of the words deduction, defalcation and abatement.

I think the defendant's covenant is very plainly expressed, and that it must be a perverse ingenuity which will put any but one meaning on it. I understand the defendant to undertake for the payment of the moneys *secured by the mortgage* in case Barton did not pay them, and that his engagement to be personally liable, and bound to the plaintiff for due payment of all the sums and performance of all the matters and things stipulated in the mortgage in case of any deduction, defalcation or abatement out of the same, is an engagement to pay and perform whatever Barton was liable to pay and perform, but neglected and omitted to do.

Even the breach, though badly expressed for that purpose, may be deemed limited to the non-payment of sums of money accruing due after the assignment, as non-payment to the plaintiff alone is complained of. The claim of the "*said sum of £1,500*," is inconsistent with this construction, and I think the true reading of it is, that the plaintiff contends the assignment passed to him all the money *secured* by the mortgage, and he asserts that no part has been paid to him.

It seems, however, absurd that we should be discussing whether the plaintiff's claim in the breach is for more than he should recover in law, when in fact he has abandoned all claim except to the £1025, which fell due on the 24th December, 1860, and has assessed his damages accordingly.

I found my opinion that the plaintiff is entitled to judgment on this demurrer on these conclusions:

1. The assignment as stated in the declaration is large enough to pass all the debt secured by the mortgage, *i. e.*, the £1,500, and there is nothing to shew necessarily that any part of it has been paid.

2. That the defendant's covenant binds him to pay whatever sums were stipulated to be paid by Barton upon Barton's default.

3. That the breach claims no more than upon the assignment and covenant the plaintiff might possibly be entitled to.

If it were deemed necessary, I would give the plaintiff leave to amend his breach by limiting it expressly to the non-payment of sums falling due after the date of the assignment, and, as I think at present, without costs, because the *nolle prosequi* will, I presume, give the defendant costs to the pleadings touching the parts of the claim which are abandoned.

Judgment for plaintiff on demurrer.

CHISHOLM ET AL. V. MORSE.

Goods sold—Judgment recovered for part, not necessarily a bar to a subsequent action for remainder—Nonsuit.

Where a party to a suit allows a verdict to be taken against him by suggestion of the judge, without insisting that the case should go to a jury upon points whereon it was the jury's province to decide, he cannot afterwards on a motion for a new trial take exception to it for misdirection. A plaintiff having failed upon a trial for a portion of his claim (goods sold) on the ground that the term of credit had not expired when he commenced his action.

Held, that the judgment recovered in the suit was not a bar to a subsequent action for the same goods, and that the plaintiff was not bound to take a nonsuit in his first action to entitle him to recover in the second.

DECLARATION filed 31st March, 1859, for goods bargained and sold, for work done and materials provided, and money due for interest and on an account stated.

Plea.—Judgment recovered in the Court of Common Pleas in favour of the defendant for "the very same identical claims and causes of action in the said declaration mentioned."

Replication that the plaintiffs brought this said action for causes of action different from all of those which the said plea of the defendant professes to cover, and from the claims and causes of action in respect of which the said judgment was so recovered by the defendant. To which the defendant rejoined, never indebted.

The trial took place at Barrie, in October, 1861, before *Hagarty, J.* The plaintiffs gave evidence of their demand sufficiently proving the items and amount of their claim.

But the witness on cross-examination stated that he had given the same evidence, proving the same items and amount at a trial which took place at Milton, and said there were no other dealings between the parties. The defendant then put in an exemplification of judgment entered in this court on the 13th of April, 1859, between these same parties in an action commenced on the 29th January, 1857, the declaration in which was exactly the same as the foregoing, except the claim for interest, to which declaration the defendant pleaded never indebted, and on the 21st April, 1857, the defendant obtained a verdict. In reply the plaintiffs' attorney swore that on that trial the defendant set up that some articles charged for had not been delivered, and that the goods were sold to him at a credit of six and twelve months; (it was on that question that the verdict was given;) that in Easter Term following a rule *nisi* for a new trial was obtained, on the grounds that the verdict was contrary to law and evidence; that the verdict was perverse, and for misdirection and on affidavits, which rule was made absolute on payment of costs, and that in Hilary Term, 21 Vic., that rule was discharged, no cause being shewn against it, on the ground that the costs had not been paid. He stated that the plaintiffs' witness on this trial had given the same evidence as on the former occasion.

The learned judge desired that the defendant's counsel would agree to a verdict for the defendant with leave to the plaintiffs to move to enter a verdict for them, but the defendant's counsel declined, whereupon a verdict was rendered for the plaintiffs, \$1097 53c., with leave reserved to the defendant to move to enter a verdict for himself.

In Michaelmas Term *McCarthy* obtained a rule *nisi* on the leave reserved, or for a new trial, the verdict being against law and evidence, the evidence not establishing that the former verdict was rendered for the defendant because of the term of credit not having expired, and for misdirection in not leaving it to the jury to say whether the former verdict was rendered for the defendant on that ground:

S. Richards, Q. C., shewed cause.

McCarthy in support of the rule cited *Palmer v. Temple*, 9 A. & E. 508; *Hall v. Middleton*, 4 A. & E. 107; *Lord Bagot v. Williams*, 3 B. & C. 235; *Sedden v. Tutop*, 6 T. R 607; *Eastmure v. Laws*, 5 Bing. N. C. 444.

DRAPER, C. J.—The rule is moved in the alternative for a verdict to be entered for the defendant on the leave reserved, and for a new trial. As to the latter, there certainly was sufficient evidence to go to the jury to warrant a finding that the cause of the plaintiffs former failure was that that action had been brought before the credit had expired, but it is said the jury did not pronounce any opinion on it, because (and this is complained of as a misdirection) this question was not left to their decision. I do not find that the learned judge was asked to leave this question as a preliminary to a verdict being found for the plaintiffs, with leave to the defendant to move to change it into a verdict for himself. It appears to me after examining the cases cited, and others, that the learned judge would have been fully sustained in directing a verdict for the plaintiffs, if the jury found the facts consistently with the weight of evidence, and the defendant now in moving to have a verdict entered for himself on the leave reserved has adopted the course taken at the trial, and should not be heard to object to it on the ground taken. He ought to have insisted on the matter going to the jury on the question suggested, declining to have leave reserved in his favour on a verdict being allowed to pass for the plaintiffs.

Then as to the other alternative. Upon this we assume the fact to be as the plaintiffs suggest, and as their witness swore; that they were beaten because the former action was brought too soon. I think the law is clearly with the plaintiffs. A reference to a few authorities will be enough to establish this.

In *Hadley v. Green*, 2 Cr. & J. 374, a landlord sued the tenant for rent and on the money counts, and on the count for money had and received had given particulars for a quantity of stone exactly corresponding with the stone mentioned in the particulars in the second case, which was an

action on the case for quarrying and carrying away stone. At the trial of the first action he took a general verdict, but only to the amount of the rent due. It was objected at the trial of the second action that the plaintiff having had an opportunity of recovering the value of the stone in the former action, he could not recover it in the second. The objection was overruled and the court upheld the ruling.

In *Heming v. Wilton*, 5 C. & P. 54, an action was brought for an attorney's bill and for money lent. As no bill had been delivered the recovery was limited to the latter demand, which was small, and it was ruled that the claim on the bill might be recovered in a subsequent action brought after the delivery of the bill, and that it was not necessary that the plaintiff should have been nonsuited in the first action to entitle him to bring the second.

In *Palmer v. Temple*, cited for the defendant, I shall only extract a passage from Lord *Denman's* judgment: "In fact the plaintiff had sued the defendant for this very deposit and the verdict had passed against him. But the evidence shewed the ground of that verdict to be that the action was prematurely brought, viz., before the contract was rescinded and before the defendant had disabled himself from completing it. The former judgment forms no obstacle to the recovery now that that event has taken place. *It is like an action brought for the price of goods before the credit had expired, which would not prevent a recovery for the same goods after that period.*"

The case of *Lord Bagot v. Williams* is distinguishable. The plaintiff's agent advisedly took a verdict for one sum knowing a larger was due, but not thinking worth while to press for it. The verdict taken under those circumstances for the smaller sum was equivalent to a consent so to limit the demand, and to take that sum as all he sought from the defendant.

In *Eastmure v. Laws* the identity of the plaintiff's demand in that suit with that covered by his plea of set-off in the former was admitted, and as in the former suit the now defendant, then plaintiff, had put the set-off in issue, and the jury had found against the now plaintiff on that issue, and

judgment had been entered up on that finding, the court on demurrer held that judgment an estoppel to the plaintiff's action for the same demand.

I should be of opinion the rule should be discharged, assuming that by allowing the verdict to go for the plaintiffs the defendant's counsel meant to admit the plaintiffs were entitled to recover the specific amount, and that the former verdict for the defendant was rendered on the sole ground that the time of credit had not expired, for in that case I have no doubt the judgment was no bar; but as my brother *Hagarty* reports, that the ground on which the verdict in the former suit passed was contested, and as the defendant's counsel to the last rested his defence on alleging that other matters were involved at the former trial, on which the jury found, and which would bar this action, we think it would be more just to grant a new trial, costs to abide the event. Both parties seem to have been in error as to the effect of letting the matter go off as it has done.

Per cur.—Rule absolute.

AUSTIN V. DICKSON AND AUSTIN V. SHAW.

Mill—Lease—Right of lessee to the use of the stream—Pleading—Consol. Stat. U. C., ch. 47—Obstruction of race-way.

The plaintiff declared as the possessor of premises near to the river Otonabee, and claimed by reason thereof the use and privileges of that stream for working his mill, &c., that the defendant, by throwing slabs and waste stuff from his mill into the stream obstructed the flow of the stream, and thereby caused injury to the plaintiff.

It appeared from evidence at the trial that one R. was owner of the mill occupied and used by plaintiff, and of the land and premises between the mill and the river, also of the land enclosing the pond, and that the plaintiff was his lessee. Evidence was also given to shew that the defendant (with others) was the cause of the obstructions complained of. The defendant objected that the plaintiff not being the owner of the land adjoining the river, and the mill not being on the river, could not claim damages for any obstruction thereto.

Held, that a *prima facie* right proved by the plaintiff was sufficient to entitle him to recover damages from a wrong-doer who shewed no right or title in himself, and

Secondly, that an assignment from R., who was the owner of the land and mill, also of the pond, carried with it the privileges and appurtenances thereto belonging, and the plaintiff as tenant of the premises was thereby entitled to recover against any wrong-doer.

Thirdly, that the form of declaration as stated was sufficient, and that there was no variance in the evidence which would bar the plaintiff's recovery.

The plaintiff declared that he was possessed of lands and premises with the appurtenances adjacent, and near to the river Otonabee, and by reason thereof of right ought to have and enjoy the benefit of the waters of that river for the purpose of working his mills being upon the said lands and premises, and that defendant by throwing slabs and other timber into the stream wrongfully and injuriously obstructed the plaintiff in the use and enjoyment of the waters of the river.

2nd count, that plaintiff was possessed of lands and premises adjacent and near to the river Otonabee, and by reason thereof was entitled to the use and flow of the stream for the benefit and enjoyment of the said lands, with the appurtenances, and for the benefit and enjoyment thereof a race-way was constructed from a dam on the stream made for the purposes of the race-way to the said lands of plaintiff, and by means of the race-way so much of the waters of the stream, as was necessary to work the plaintiff's saw mill erected and being upon the said lands, of right did and ought to flow through the race-way to the lands of plaintiff,

but defendant intending to injure plaintiff in the use of the stream for the purposes, and by the means aforesaid, hath wrongfully thrown and continues to throw into the stream above the dam and race-way, slabs, &c., which sink in the stream and dam near the entrance of the race-way, and by so sinking, prevent the water of the stream from flowing in its natural and accustomed manner through the race-way, and by these means defendant wrongfully prevents the plaintiff in his use and enjoyment of the stream for the purposes aforesaid. And the plaintiff (by amendment at the trial) claimed damages arising from his being prevented manufacturing a large quantity of lumber in the mill, and from the loss of profits on such lumber.

Pleas.—1. Not guilty. 2. Plaintiff not possessed of the lands, &c. 3. Plaintiff not entitled to the benefit and advantage of the river. 4. The damage complained of was caused by erecting the dam mentioned in the 2nd count in an improper manner without providing necessary wastegates to afford a passage for slabs, bark, drift-wood, saw-dust, &c., annually floating down the river.

The case was tried in October last at Peterborough, before *Richards, J.* It appeared that the premises in question, including the race-way, and the land adjoining the dam on the river and the land around the pond, as well as both banks of the river at that place were owned by one Robert D. Rogers, who, on the 16th of March, 1857, executed a lease of a saw-mill with all the privileges and appurtenances, and the right to use a sufficient quantity of water to drive certain described machinery, and no more, to one Jacob Valentine and the plaintiff for a term of ten years, at a rent of £150 per annum; and that on the 5th of June, 1858, Valentine assigned the lease and the premises mentioned therein to the plaintiff. The premises, *i. e.*, land and saw-mill, did not extend to the banks of the river nor include the dam, which, as well as the race-way, was constructed to convey water from the river for the working of this saw-mill and other mills. A dam was first built at that place in 1848; and before 1847 there was no race-way constructed. The dam referred to at the trial was built in

1852. When the race-way was constructed, the water at the entrance varied in depth from nine to fourteen feet. The ordinary height at the head-gate was nine feet, and when the lease was assigned to the plaintiff there was a good flow of water into the race-way.* Slabs and grindings of slabs were thrown year after year into the river by the proprietors of saw-mills above the race-way, and in 1860 they obstructed the flow of water into the race-way to such an extent that the plaintiff could do so little he gave up working the mill. These slabs and grindings were sunk in the river all the way down the pond to the dam and head-gate of the race-way. Evidence was given to shew that the obstruction arose from these slabs, and not from the gradual wearing away of the bank of the river, and that in 1860 there was only two feet of water where formerly there was fourteen. The slabs filled a space 180 feet wide. It was shewn that the defendant owned the land next above Rogers, and that the slabs thrown in from a mill of his formed the greater portion of those which created the obstruction. He had been fined in 1860 for throwing slabs into the stream contrary to the statute, and in conversation with Rogers had said, that as long as those having mills higher up threw slabs into the river he would do the same.

For the defendant it was objected—1st. That there was no evidence that plaintiff was in possession of any land by virtue of which he had a right to the flow of the stream. That neither the mill nor the land leased to the plaintiff adjoined the river Otonabee. Leave was reserved to move for a nonsuit on this ground. 2nd. That there was no evidence of any obstruction to the natural flow of the water, but only that it was prevented from entering the artificial channel or race-way. The learned judge thought there was evidence to go to the jury on this point. The learned judge told the jury to assume for the purposes of this suit that plaintiff was entitled to the natural flow of the water to supply his mill, and to say whether defendant, by wrongfully throwing slabs, &c., in the stream caused an obstruction to that flow, or substantially contributed to the obstruction by casting slabs into the stream. If so, that the plaintiff

should have a verdict; and he directed them as to the measure of damages. No objection was then or has been since raised by the defendant to the charge. The jury found for the plaintiff, damages \$400.

In Michaelmas Term *Read*, Q. C., obtained a rule *nisi* to enter a nonsuit on the leave reserved, there being no proof that plaintiff was entitled to the lands and premises mentioned, or any estate therein, so as to give him a right to the use of the waters of the river Otonabee, or that he was by virtue of his possession or otherwise entitled to the use and flow of the waters of the river for the purposes mentioned in his declaration. Or, for a new trial, the verdict being against law and evidence, and the 2nd, 3rd and 4th pleas being established in evidence.

Crooks shewed cause, and cited Addison on Torts, p. 10, 63 & 64; Lord v. Commissioners of Sidney, 12 Moore P. C. C. 484; Miner v. Gilmour, 12 Moore P. C. C. 131; Tucker v. Paren, 7 C. P. U. C. 269; Dickinson v. Grand Junction Canal Company, 7 Ex. 299; Chasemore v. Richards, 5 Jur. N. S. 873; Northam v. Hurly, 1 E. & B. 665; Laing v. Whaley, 3 H. & N. 675; Mason v. Hill, 5 B. & Ad. 1; Rogers v. Dickson, 10 C. P. U. C. 481; Con. Stat. U. C., ch. 47, sec. 2.

Read, Q. C., in support of rule, cited Frankum v. Earl of Falmouth, 2 A. & E. 452; Gale on Easements, 415; Wood v. Wand, 3 Exch. 748; Sampson v. Hoddinot, 1 O. B. N. S. 590; Cawkwell v. Russell, 26 L. J. Ex. 34.

DRAPER, C. J.—The declaration in both counts asserts the plaintiff's possession of certain lands and premises adjacent to the river Otonabee; and that by reason thereof he was entitled to the benefit of the waters of that river to work his mills on the said lands, stating on the second count the mode in which he was entitled to the benefit and enjoyment, use and flow of the stream, but both counts assert his claim to the water by reason of his possession of land adjacent and near to the river.

The defendant pleads, 1st, not guilty. 2nd, that the plaintiff was not possessed of the lands and premises men-

tioned in the declaration. 3rd, that the plaintiff was not entitled to the benefit and advantage of the waters of the Otonabee. And 4th, that the damage complained of arose from the faulty construction of a dam mentioned in the second count.

Issue was taken on all these pleas. As to the first, it has not been argued that the evidence was not sufficient to shew that the defendant had not been one of the persons by whom, or by whose direction, slabs and other substances were thrown into the river, and that the accumulation of them obstructed the flow of water into the race-way, an act not only, as the evidence shewed, injurious to the plaintiff, but contrary to the express provisions of Consol. Stat. U. C., ch. 47, sec. 2, which subjects the offender to a penalty not exceeding \$20 for each day during which the obstruction remains.

But it was objected at the trial that there was no evidence that defendant was in possession of any land by reason whereof he had a right to the use and flow of the stream, because neither the mill nor the land leased to the plaintiff adjoined the river, and on this objection a motion to enter a nonsuit has been made pursuant to leave reserved.

No objection has, nor, that I see, could have been made to the declaration.—Webb v. Fox, 7 T. R. 391; Northam v. Bowden, 11 Exch. 70. On the other hand no justification of the act complained of has been advanced by the defendant. He is liable, if it be sufficiently averred as well as proved that he has injured the plaintiff, and as a mere wrongdoer *prima facie* evidence of the plaintiff's right is sufficient against him. He sets up neither right nor title.

Evidence was given without objection, and the fact itself not being questioned, that Rogers owned the mill and other premises leased, together with the land adjoining those premises, and through which the race-way was made to the river, and the land around the mill-pond, and on both sides the river, including the land where the dam is built. This sufficiently shewed Rogers to be riparian proprietor, and as such possessed of a right to use the water of the river to work his mills on the adjoining lands, and to lead it

through a race-way for that purpose. He leased the saw-mill for a term of ten years with its privileges and appurtenances, and also the right to use a sufficient quantity of water to drive a set of four wheels on a horizontal shaft. This water was conducted from the river through the race-way. The plaintiff, by assignment acquired all the rights the lease gave, and he became therefore possessed of the right as limited to use the water of the river passing down the race-way to work the saw-mill. This certainly was evidence of his right, and the only question is, whether it was evidence to sustain the declaration; for I assume that a tenant may bring an action for damages resulting to real property in his occupation, whether it be in the enjoyment of profits *a prendre*, or of any easement appurtenant, as for obstructing a private way, darkening ancient lights, or preventing the flow of water to a mill, or backing water so as to injure the work of a mill, &c.

The case of *Northam v. Hurley* (1 E. & B. 665) is, I think, a strong authority in plaintiff's favour. There it was held that it was sufficient for the plaintiff to declare, that by reason of his possession of certain land was entitled to have the use and benefit of water flowing in a certain direction, in a particular channel, though the plaintiff derived his right under a deed by which A. the then owner granted to B., that a stream which run through the land to the land of B. should be under the control of B. and his assigns, and should flow in a free and uninterrupted course through a channel in A.'s land described in the deed, and afterwards B. assigned to the plaintiff, while A. assigned to the defendant, who diverted the water from this channel. The court held that a diversion of the water from this channel was an injury to the plaintiff's right, for which plaintiff might recover, claiming merely by reason of possession, without referring to the deed which granted the easement.

So here the right to the water is granted as an appurtenance to the land and mill, by way of easement thereto. See *Coryton v. Lithebye*, 2 Wms. Saund. 114, 4 (1) g. It is annexed to the lease of the premises, as a means of enjoying them profitably, and the right to the easement or appur-

tenance goes with the right to the principal subject. I think therefore the plaintiff may, under the allegation in the declaration, prove his right derived under the lease, and therefore that the case was properly submitted to the jury.

Then as to the pleas denying that plaintiff was possessed of the land and premises mentioned, and denying that he was entitled to the benefit and advantage of the waters of the river, the lease was proved, and the evidence of the lessor's right is, I think, ample to uphold the verdict, and I think there was nothing to make the finding of the jury on the last plea wrong or against law or evidence.

I think, therefore, the rule should be discharged.

Per cur.—Rule discharged.

AUSTIN V. SHAW.

The pleadings are the same as in the case of *Austin v. Dickson*, and the trial took place at the same assizes. All the evidence was the same except as to the obstruction, as to which it appeared that the defendant's mill was about two miles above the dam; that the mass causing the obstruction was composed of slabs, grindings and edgings. When the slabs sink the grindings and edgings fill in and form a solid wall. There are two mills between the plaintiff's mill and the defendant's, and two above the defendant's, all of them above the plaintiff's. Mr. Rogers again stated that he owned all the property between the race-way and the river except Morey's lot and mill, which extended as far north as the plaintiff's premises, and intervened between them and the river fronting on Elizabeth street. There is a waste wear now in Rogers' dam through which the slabs, &c., can be put to clear the obstruction away. Some evidence was given that waste stuff thrown in from the defendant's mill formed part of the mass of stuff causing the obstruction. The defendant had been brought before a magistrate under the statute and confessed throwing grindings, i. e., waste stuff into the river and evidence was given that grindings did as much mischief as slabs, and that the plaintiff in October last incurred expense in removing slabs, &c.

The defendant's counsel renewed the first objection taken in the other case which was reserved, and objected, secondly, that there was no evidence that the grindings thrown in by the defendant caused any part of the obstruction. The learned judge also gave leave to the defendant to move on this ground, thinking the case feeble, and asking the jury to say whether the defendant's acts, throwing in grindings, &c., caused the obstruction complained of. The jury found for the plaintiff, \$200 damages.

In Michaelmas Term, *Read*, Q. C., obtained a rule *nisi* in no respects differing from that in *Austin v. Dickson*, to which *A. Crooks* shewed cause.

For the reasons given in the other case I think the rule should be discharged.

Per cur.—Rule discharged,

DONKIN V. CROMBIE.

Interpleader—Mill—Gearing and fixtures—Right of property therein.

One I. being the tenant of premises under the plaintiff consisting of a mill, &c., upon the same being burned down, refts the machinery, putting in some of the old and some new portions, the sheriff seizes under an execution against the tenant and levies and removes some portion of the gearing. It was not shewn whether the tenant's term had expired at the time of the seizure or not, nor whether he was under a covenant to repair or keep in repair or not. Upon an interpleader to try the title to the property seized by the sheriff, *held*, that the facts were not sufficiently stated to enable the court to come to a decision, but that the *prima facie* case appeared in favour of the plaintiff as landlord of the premises.

INTERPLEADER issue to try whether certain goods on the 30th day of July, one thousand eight hundred and sixty-one, seized in execution by the sheriff of the county of Perth, under a writ of *fiery facias*, tested the 29th day of July, in the year of our Lord one thousand eight hundred and sixty-one, and issued out of Her Majesty's Court of Common Pleas for Upper Canada at Toronto, directed to the said sheriff for the having execution of a judgment of that court recovered by the said James Crombie, in an action at his suit against William J. Imlach and Henry T. Imlach were,

or some part thereof was at the time of the said seizure, to wit, on the thirtieth day of July, in the year of our Lord, one thousand eight hundred and sixty-one, the property of the said Robert Donkin as against the said James Crombie.

The cause was tried at the assizes for the county of Perth in Stratford, on Tuesday, the twenty-ninth day of October, before the Honorable Mr. Justice Burns, when the following evidence was given:

Peter Nevin.—I know lot 16, in the first concession of Hibbert. There was a mill upon it burned down last July; the sheriff after the fire made seizure; the mill was a grist and saw-mill worked by steam; I worked it for five months under an agreement I had with Imlach; it was burned to the ground; the sheriff seized all the mill gearing and removed a part of it; brought it to my house; the heavy part of the machinery was left on the ground; I held the property for the sheriff for a time; some of the machinery was connected with brick; all the machinery mentioned in the list put in was in use except an air valve; the picks and scales were used in the mill although not part of the machinery. The log-chain was used in drawing in logs; I went in as an under tenant of Imlach in January, 1860, and I have had possession since. About a year ago a part of the machinery was taken away; the boilers and engine and an upright shaft, these were moved by Imlach's consent and for the purpose of being repaired; the other parts of the machinery remained in their place; the steam pipes and the safety valve were disconnected; the furnace front and grate are there still, but are loose and can be removed; (asked as to the machinery which was carried into the grist-mill when other parts removed to be repaired;) Imlach re-built them after a former fire, and part of the old machinery of the former mill was put in the new. The scales belonged to Imlach; he bought them and brought them there; the machinery which was put in the mill was only put there while the boiler and engine were being repaired, and was intended to be restored when the repairs were completed.

The point in dispute between the parties was this: the plaintiff was the legal proprietor of the land upon which the mill was erected, and he claimed as such legal proprietor all such

parts of the machinery as belong to the mill and other things as would partake of the character of the freehold. The machinery in part was put into the mill by Imlach, who was a tenant. During his tenancy, whatever would in its nature and character be considered as part of the freehold the defendant did not contend would be liable to execution, but the defendant contended the tenant first of all severing the machinery and sending away part of it and disconnecting portions of it which were put into the grist-mill until the other was repaired, and then afterwards while in that state the destruction of both grist and saw-mill, restored the property to such a state and position as that the machinery, &c., which would have been considered as part of the freehold at one time was not any longer to be so considered, in fact the effect was to restore it to the position of goods and chattels, and as such were to be considered as Imlach's, and liable to execution, except as to such parts of machinery, &c., as were put in by the plaintiff, that is, those parts the defendant did not contend were liable to execution. The plaintiff did not admit that Imlach had any right as tenant now, and the case not to be understood any further than as tenant at the time the machinery was put in he was such, for the plaintiff contended that the tenant's right to possession was forfeited. The witness stated that a writ of ejectment had been served upon him by the plaintiff. Record with verdict endorsed of last assizes put in in a suit by this plaintiff v. the Imlachs.

T. A. Carroll.—I was attorney for the plaintiff in the ejectment, plaintiffs v. the Imlachs. Record produced—the verdict still stands. Judgment not entered.

A verdict was taken subject to the opinion of the court on the whole case.

C. Robinson for plaintiff, cited *Grant v. Wilson*, 17 U. C. Q. B. 144; *Harris v. Malloch*, 21 U. C. Q. B. 82; *Waterfall v. Perristone*, 6 E. & B. 889.

Irving for the defendant, referred to *Elliott v. Bishop*, 10 Ex. 496; *Carscallen v. Moodie*, 15 U. C. Q. B. 315; *Stansfeld v. Mayor of Portsmouth*, 4 C. B. N. S. 131; *Tarrant v. Thompson*, 5 B. & Al. 826.

DRAPER, C. J.—I presume we are to gather the facts from the statement of the learned judge and the evidence. These appear to me to be, that the plaintiff was and is proprietor of the land on which stood a grist and saw-mill worked by steam. That Imlach (one or both) was tenant thereof for some term, the beginning of which is not proved, nor that it is at an end further than is shewn by the production of a *nisi prius* record in an action of ejectment brought by the plaintiff against the Imlachs, and tried at the preceding assizes, when a verdict was endorsed for the plaintiff, which verdict, it was sworn, "still stands." That at some period during the tenancy the mill was burnt down and rebuilt by Imlach, who put in part of the old machinery and completed what was wanting, but whether upon any arrangement with the plaintiff, or because by the covenants in his lease he was bound to repair was not in any way explained.

Neven swears that in January, 1860, he went into the premises as under-tenant to Imlach; that he worked the mills for five months (perhaps at some other time) under an agreement with Imlach, and has had possession since January, 1860. The writ of ejectment was served on him. The mill (both grist and saw) was burned down last July. After the fire (as I understand, though it is not distinctly stated) the sheriff seized all the mill gearing and removed a part, leaving the heavy portion of the machinery on the ground, some of which was still connected with the brickwork. In the latter part of 1860, the boilers, engine and upright shaft were removed *with Imlach's consent* to be repaired. The steam pipes and safety-valve were disconnected, the furnace front and grate were left loose, and parts of the machinery were taken out of the engine-room and put into the grist-mill, but were intended to be replaced when the repairs were completed. A list was put in distinguishing, 1st, the articles taken by the sheriff off the premises. 2nd. Those remaining on the land. 3rd. Those removed from the engine-room into another room in the latter part of 1860:

It was not shewn whether the term granted to the Imlachs by the plaintiff was existing or no—when the sheriff seized—

and there is so far a presumption against its continuance that the plaintiff had brought an ejectment against the Imlach's for these premises, which was tried and a verdict given, though the evidence falls short of establishing that the plaintiff recovered, as no judgment was entered (*Fisher v. Kichingman*, Willes 367.) The machinery was seized upon this land, and if the plaintiff were there in the lawful possession of the premises, it would give him at least a *prima facie* possession of the machinery lying thereon, and the burden of proving a right to seize would be cast upon the defendant.

But assuming that the term continued, then I am of opinion that such parts of the machinery as were trade fixtures put up by the Imlachs, were under the circumstances so severed from the freehold that they were liable to be taken in execution.

Still the question would remain, as to what portion of the things seized this view will apply? and here I find difficulty in ascertaining the facts.

I understand that when the plaintiff first let the premises to the Imlachs there was a grist and saw-mill worked by steam, thereon. The machinery and motive power as well as the land and buildings belonged to him, and were together leased by him. The first fire, though it may have severed the machinery from the freehold, would not make such machinery the property of the tenants. Only such new or additional machinery as they put in when they re-built the mills could be theirs as trade fixtures, and if they were under a covenant to repair without exceptions, then the new machinery affixed to the freehold would, I apprehend, stand in place of the old and be the plaintiff's, in which case no subsequent severance could revert the property in the Imlachs as their chattels. And even if they were trade fixtures, it is not certain, looking at all the facts, that they had not quitted possession and so lost the right to remove them, if the term had expired, though if the term was, as was thrown out, forfeited, then as the sheriff seized before judgment in ejectment it may be doubted whether the plaintiff could claim them as his.

To determine this case satisfactorily we should know

whether the term granted to the Imlachs had expired by efflux of time, or was forfeited, and in consequence of such forfeiture the plaintiff had a verdict in the ejectment suit, on which he may yet enter judgment. We should also know whether by the lease the Imlachs were bound to repair, and at the determination of the term, to give up the premises in repair, and upon what understanding or agreement, if any, the new machinery was put in by the Imlachs after the first fire.

In the absence of further information I am inclined to think the presumption is in favour of the plaintiff, as originally owner of the mills and machinery, and whose right to the realty would *prima facie* draw the possession to it, and with that, the possession of the chattels upon it, there being no evidence of a lease in writing and no sufficient proof of any existing term, and on the strength of that presumption I must award the *postea* to the plaintiff.

Per cur.—*Postea* to plaintiff.

HOLTON V. SANSON ET AL.

Fraud—Estoppel—Privy—Warehouse receipts—Con. Stat. Can., ch. 54, sec. 8, ch. 98, sec. 68.

Defendants gave a receipt to C. H. & Co., stating that they had received and held on their (C. H. & Co.'s) account 500 bushels of wheat. Plaintiff relying upon this receipt, and the representations made by C. H. & Co., purchased from the said C. H. & Co. the supposed 500 bushels of wheat, and took an assignment of the said receipt as evidence of his purchase, and as authority to defendants to deliver the same to plaintiffs. In fact, however, the defendants at the date of the receipt had only received some 270 bushels on account of C. H. & Co.

Held, 1st. That defendants having given their receipt for 500 bushels of wheat were estopped from setting up that they had not at the date thereof the quantity of wheat mentioned therein in store for C. H. & Co.

2ndly. From the evidence it is to be assumed that the defendants gave this receipt to C. H. & Co. for the purpose of enabling C. H. & Co. by means thereof to sell the amount of wheat therein mentioned to any person to whom they offered the same for sale, and thereby sufficient privy was established between plaintiffs and the defendants to enable him to sue for the damage he sustained by reason of their (defendant's) false representation.

The first count was in trover for five hundred bushels of spring wheat.

2nd count alleged that defendants carrying on business under the firm of Sanson & McNabb, under that name on the 26th of January, 1861, though they had not received in store 500 bushels, or any other quantity, of wheat for Clarkson,

Hunter & Co., falsely and fraudulently made and delivered to them a receipt to the effect following: "500 bushels,—Orillia, 26th January, 1861.—Received in store for and on account of Messrs. Clarkson, Hunter & Co., of Toronto, five hundred bushels of spring wheat," whereby defendant falsely and fraudulently represented that they had received and then held 500 bushels of spring wheat for and on account of Clarkson, Hunter & Co., and as their property, and thereby enabled Clarkson, Hunter & Co. to represent themselves to be the owners of the said 500 bushels of wheat to the plaintiff, and plaintiff relying upon the receipt and representations made by C., H. & Co. in consequence thereof, that they were the owners, and had the right to sell the said wheat, and that the defendants had received in store for, and on account of C., H. & Co. the said 500 bushels of wheat, and then held the same on their account, bought from C., H. & Co. the said 500 bushels of wheat, and took from them an assignment of the said receipt as evidence of the purchase, and as authority to the defendants to deliver the said wheat to plaintiff, whereas in truth defendants had not, when they so falsely and fraudulently granted the said receipt, received the said 500 bushels of wheat, or any part thereof, into store, for or on account of the said C., H. & Co., and defendants wholly refused to deliver the said 500 bushels of wheat, or any part thereof, to plaintiff, whereby he was deprived of the same.

Third count.—That defendants falsely and fraudulently represented in writing that they had received in store for and on account of C., H. & Co. 500 bushels of spring wheat, and the defendants, at the time when they made such representations, knew that by the course of trade in this province, it would be, and in fact was, intended by the defendants to be used and relied upon by any person dealing with the said C., H. & Co., to evidence the possession of the said wheat by the defendants for C., H. & Co., and that they had the right to sell and dispose of the same; and plaintiff averred, that he relying on the representations so made by defendants in said receipt, purchased from Clarkson, Hunter & Co. the 500 bushels of wheat in the receipt mentioned, whereas

in truth at the time the defendants so made the receipt they had not received the said wheat, or any part thereof in store, for, or on account of the said C., H. & Co., whereby plaintiff lost and was deprived of the wheat so purchased.

Damages claimed, £250.

The defendants pleaded :

1st.—Not guilty.

2nd. Plea to first count—Goods were not plaintiff's.

3rd. Plea to second count—Plaintiff did not buy the said wheat from the said C., H. & Co., nor did he take any assignment of the said receipt from them.

4th. Plea to third count, same as 3rd plea to 2nd count.

The second and third counts were also demurred to.

The cause was taken down to trial at the fall assizes for 1861, for the United counties of York and Peel, held before the Chief Justice of this court.

It appeared that plaintiff, through his agent, some time about the 3rd of December, 1860, bought from Clarkson, Hunter & Co., of this city, a thousand bushels of spring wheat at 90 cents a bushel, f. o. b., and paid them for it. C., H. & Co. gave the plaintiff's agent as collateral security for the payment of the money until he got other receipts for the delivery of the spring wheat, warehouse receipts endorsed to him for 1000 bushels of fall wheat, warehoused in Toronto. C., H. & Co. having disposed of the fall wheat to other parties, delivered over to plaintiff's agent about the date of the defendants' receipt, the receipt set out in the second count of the declaration, which the agent received as part delivery of the 1000 bushels of spring wheat he had bought. C., H. & Co. were then in good standing, but about a month after absconded. One of the defendants on being applied to by plaintiff's agent, stated that at the time they gave the receipt C., H. & Co. had only 225, or 275 bushels of wheat in their store; that the receipt was got through drafts; that C., H. & Co. had promised to pay the balance of the money to make up the price of the 500 bushels to Ogilvy & Co., a draft was actually drawn by defendants on C., H. & Co. for \$250, in favor of Ogilvy & Co., but was never paid.

On a demand being made on plaintiffs behalf of defendants for the 500 bushels of wheat, they refused to deliver it, but offered to deliver between 250 and 300 bushels if they got up their receipt. Plaintiff's agent offered to endorse on the receipt the amount which defendants would deliver on it, but they declined delivering any.

There was evidence by business men that it was usual to buy grain on the presentation of receipts like the one produced, and to take a transfer of the property so bought, by endorsement of the receipt.

The defendants' counsel objected at the trial as to the first count: the property did not pass by the receipt to the plaintiff; and 2ndly, no demand and refusal to deliver was proved.

Second and third counts: no evidence of intention to deceive on the part of the defendants; and the evidence shewed a contract for the purchase of 1000 bushels, and the receipt was only as security for the delivery of the whole; on the point of the refusal to deliver, the learned Chief Justice gave defendants leave to move to enter a nonsuit, and directed the jury, that defendants having signed the receipt was an acknowledgment that they had 500 bushels of spring wheat as the property of C., H. & Co., subject to their disposal; and that on the evidence such property is commonly in trade transferred by endorsement on the receipt, (the receipt in this case was proved to have been endorsed by C. H. & Co.,) and these facts established the plaintiff's right to recover on the 1st count if there was a demand; and for the time he held that if the jury found a demand of the whole 500 bushels, and defendants refused to deliver a part without the surrender of the receipt, and a direct refusal to deliver the whole, plaintiff was entitled to recover on the first count.

As to the second and third counts, he told the jury there was evidence to sustain them. That defendants acknowledged they had received 500 bushels of wheat on account of C., H. & Co., when they had not got that quantity; that they thereby enabled C., H. & Co. to deceive purchasers from them, and plaintiff was deceived and purchased, and defendants would not deliver. He left it to the jury to say if they were satis-

fied that plaintiff, on the faith of the receipt, accepted it as part performance of the contract between plaintiff and C., H. & Co., for the purchase of the 1000 bushels of spring wheat. If so, plaintiff could recover on the second and third counts. The plaintiff resting, according to the view of his lordship, his right to recover on the second and third counts on his purchase being occasioned by defendants fraudulently and falsely giving the receipt; this point was left to the jury, and also whether the receipt was given to plaintiff as a purchaser or as a mer. pledge.

The jury found for plaintiff, \$430 damages.

During Michaelmas Term last, *M. C. Cameron* moved to set aside the verdict as contrary to law and evidence, and for misdirection in the learned Chief Justice telling the jury that the receipt put in at the trial was sufficient to pass the property in the wheat, and that it was not necessary that the false representation should have been made by the defendants to the plaintiff personally, and though Clarkson & Hunter knew the facts, and could not be deceived, still the receipt contained an untrue statement in part, and the defendants were liable; and also on the ground that the verdict is general, and on the first count is excessive, as under it plaintiff could only recover for the quantity of wheat actually in store at the date of the receipt, and at the time of the demand.

Galt, Q. C., shewed cause, and contended that as to the first count, the property passed by virtue of the sale, and the transfer of the receipt was merely an order to defendants to deliver to plaintiff what he had purchased from Clarkson & Hunter, and which defendants acknowledged they had in store for them. That as to the wheat admitted to be on hand the verdict was clearly right; and as to the rest it was of no consequence, as the other two counts were good, and the evidence well warranted the verdict.

He further contended that the certificate being false in fact, and given by defendants to Clarkson Hunter & Co. to pass away in the course of business, was such a false and fraudulent statement that any one injured by it to whom the false receipt was shewn, could bring an action for the injury

he suffered in consequence. He referred to the Con. Stat. of Canada, ch. 54, sec. 8, and ch. 92, sec. 68, as shewing the intention of the legislature to pass the property in grain, &c., by the endorsement of these warehouse receipts, and the severity with which the issuing of such receipts with intent to defraud is punished. He referred to *Paisley v. Freeman*, 3 T. R. 62; *Polhill v. Walter*, 3 B. & Adol. 123; *Milne et al. v. Marwood*, 15 C. B. 778; *Behn v. Kemble*, 7 C. B. N. S. 260. Addison on Torts, chapter Misrepresentation.

M. C. Cameron in support of the rule, contended that the receipt was not a general notice to the public, as in the report of the officers of a joint stock company, but the receipt is given to individuals—private persons, who knew the statement contained in it was false in fact. The endorsement of the receipt does not pass the property in the wheat, and therefore plaintiff cannot maintain trover. It is not alleged in the declaration that defendants are warehousemen, and therefore no argument from the legislative enactments as to fraudulent receipts by warehousemen, and their transfer, can apply to this case. The evidence does not support the declaration, for it shews the receipt was delivered to be held as a collateral security for the performance of another contract—the delivery of 1000 bushels of wheat. He referred to and commented on the following cases: *Bedford v. Bagshaw*, 4 H. & N. 539; *Scott v. Dixon*, 29 L. J. Exc. 62 n.; *Proudfoot v. Anderson*, 7 U. C. Q. B. 573; *Clarke v. Dickson*, 6 C. B. N. S. 453; *Deady v. Goodenough*, 5 U. C. C. P. 163.

RICHARDS, J.—As to the first count, assuming that the wheat belonged to Clarkson, Hunter & Co., and was all in the defendants' possession and separated from any other wheat, the quantity being exactly that bought, viz., 500 bushels. Then the property in the wheat passed to the plaintiff by virtue of the bargain and sale, the endorsing of the receipt was nothing more than a direction to the defendants to deliver the property to the person who had become the owner, and who had a right to it independent of that endorsement. In *Dixon v. Yates*, 5 Bar. & Adol., *Parke, J.*, at page 340, states:—

"I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery." We had occasion lately to consider the effect of a sale to pass the property in chattels by the law of England, in *Dempsey* appellant, and *Carson*, respondent, (11 U. C. C. P. 472,) on an appeal from the county court of York and Peel. The general doctrine is that the property in the specific goods passes to the purchaser subject to the vendor's lien for the unpaid purchase money. This of course is the doctrine of the common law irrespective of the provisions of the Statute of Frauds, as to contracts in writing or payment of earnest or of purchase money, which do not apply in the case before us. By the finding of the jury, and under the evidence, it seems clear that the plaintiff's agent had paid C. H. & Co. in full for the 1,000 bushels of wheat, and the 500 bushels mentioned in the defendants' receipt were accepted as a delivery of that quantity under the agreement for the delivery of the 1000 bushels.

As to so much of the 500 bushels of grain as was in the defendants' possession belonging to C., H. & Co. when the receipt was given, and when the same was sold to the plaintiff, there can be no doubt the property in that passed to the plaintiff, and as to that the plaintiff is entitled to recover in *trover*, the defendants having refused to deliver the same when demanded.

I incline to the opinion, however, that under the doctrine of estoppel as laid down in *Pickard v. Sears*, 6 A. & E. 474, the defendants cannot be permitted to set up that they had not 500 bushels of wheat *in store* belonging to C., H. & Co., when they gave their receipt. From the evidence and finding of the jury I think we must assume that when the defendants signed the receipt they knew that C., H. & Co. would produce it to intending purchasers, or, in other words, take it into the market, and on the faith of the truth of the representation therein contained (that they, the defendants, had five hundred bushels of their grain *in store* for them) sell that quantity so stored to any person desirous of purchasing it, and at the time they signed the receipt they knew they had but little over half that quantity of grain *in store*

for C. H. & Co., consequently the representation made in the receipt was false, and was intended to be used to deceive others, the signers expecting to be in a position to obtain the residue of the grain before it was called for. Now the rule in *Pickard v. Sears*, as I understand it, is, "that where one by his words or conduct *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In reference to this case, *Parke, B.*, in *Freeman v. Cooke*, 2 Ex. p. 663, says: "By the term *wilfully* we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting the truth."

If then the defendants had personally represented to the plaintiff what was contained in their receipt, and on the faith of it he had bought the 500 bushels of wheat from C., H. & Co., I cannot doubt that they would be estopped from asserting in this action that that statement was not true. Then does the giving of the receipt to C., H. & Co., to enable them to produce it to intending purchasers, and the fact of its being produced to the plaintiff, and his relying upon it, make it any the less a statement by which the defendants ought to be bound? I think not.

The case of *Polhill v. Walter*, 3 Bar. & Adol., 114, seems to me to lay down doctrines applicable to this case. The leading facts in that case were that a bill of exchange was drawn on a person named *Hancome*, who lived in the same house with the defendants, in *H.*'s absence the bill was presented, and one *Armfield*, one of the payees of the bill, persuaded the defendants to accept it in the name of *Hancome* by procuration. He had no authority so to accept, and

in an action against Hancome, the holder of the bill was defeated because it was shewn the defendant had no authority from H. to accept. The defendant accepted the bill fully believing what he did would be sanctioned and the bill paid at maturity. The jury on the trial as a fact negatived all fraud in the defendant. The declaration alleged that the defendant falsely, fraudulently and deceitfully represented and pretended he was duly authorised to accept the bill, and the plaintiff relying on the pretended acceptance, and believing the defendant had authority from H. to accept the bill, received it from the last endorsee in discharge of a debt. In giving judgment, Lord *Tenterden* observes :

"It is contended that the allegation of falsehood and fraud was supported by the evidence, and that in order to maintain this species of action it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff, it was said to be enough if a representation is made which the party making it *knows to be untrue*, and which is intended by him, or which from the mode in which it is made is calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be in the legal sense of the word a fraud, and for this position was cited the case of *Foster v. Charles*, 6 Bing. 396; 7 Bing. 105; which was twice under the consideration of the court of Common Pleas, and to which may be added the recent case *Corbitt v. Brown*, 8 Bing. 33. The principle of these cases appears to us to be well founded, and to apply to the present.

"It is true that there the representation was made *immediately* to the plaintiff, and was *intended* by the defendant to induce the plaintiff to do the act which caused him damage. Here the representation is made *to all to whom the bill may be offered* in the course of circulation, and is in fact intended to be made to *all*, and the plaintiff is one of those, and the defendant must be taken to have intended that all such persons should give credit to the acceptance, and there by act upon the faith of that representation, because that in the

ordinary course of business is its natural and necessary result.

"If then the defendant, when he wrote the acceptance, and thereby in substance represented that he had authority from the drawee to make it, knew that he had no such authority, (and upon the evidence there can be no doubt that he did,) the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence."

I think the principles of law here laid down will apply to the case before us. Here the false representation is made to all to whom C. H. & Co. may wish to sell the wheat, and was made to aid them in doing so, the plaintiff being one to whom they wished to sell, and did sell, the false representation must have been intended to have been made to him. False and fraudulent representations made by the directors as to the state and condition of joint-stock companies to induce persons to purchase the stock or shares of such companies, have given rise in modern times to many actions brought to recover damages for these fraudulent representations by parties who have been induced in consequence of such representation to purchase shares in the companies. In these cases it is frequently objected that there were no personal representations by the defendants to the plaintiff, by which they were mislead, and therefore the action would not lie. The courts have generally decided against such objections when it was shewn that the reports of the affairs of the companies containing the fraudulent statement of facts were intended to be made public and to induce parties to become purchasers of their stock. In *Scott v. Dixon*, 29 L. J. Ex. 62 N., an action against one of the directors of the Liverpool Borough bank for false representations contained in a report published by the bank, Lord Campbell said: "Reports of joint-stock companies, though addressed to the shareholders, are generally meant for the information of all who are likely to have dealings with the company, and I have no doubt that the directors in the present case knew that this particular report would, a few hours after its publication, be in the hands of all the share-brokers in Liverpool,

and that it would be acted on by those who had or wished to have dealings with the bank. But, moreover, we have here the positive evidence that it was to be bought by any person who wished to become a purchaser of shares, and it thus came into the hands of the plaintiffs, and the plaintiffs by the persual of it were induced to buy shares in the bank. I have, therefore, no doubt whatever that the allegation in the declaration that that representation was made to the plaintiffs, is most completely established, and the damages given are no more than the damnification which they have suffered in consequence."

In *Bedford v. Bagshaw*, 4 H. & N. 538, *Bramwell*, B., observes at p. 548: "It is not a bad rule that a person who makes a fraudulent representation which is intended to be generally circulated shall be liable to any person injured by acting upon it, however remote the *consequences* may be."

Pollock, C. B., on the same page observes: "The defendant acted fraudulently and made representations to the committee of the stock exchange with a view to induce persons to believe the existence of a particular state of things as to these shares. All persons buying shares on the stock exchange must be considered as persons to whom it was contemplated that the representation would be made. I am not prepared to lay down as a general rule that if a person makes a false representation every one to whom it is repeated, and who acts upon it may sue him. But it is a different thing where a director of a company procures an artificial and false value to be given to the shares in the company which he professes to offer to the public. Generally, if a false and fraudulent statement is made with a view to deceive the party who is injured by it, that affords a ground of action; but I think there must always be this evidence against the person to be charged, viz., that the plaintiff was one of the persons to whom he contemplated that the representation should be made, or a person whom the defendant ought to have been aware he was injuring or might injure. If the director of a company, one of the persons who puts the shares forth into the world, deliberately adopts a scheme of falsehood and fraud, the effect of which is that parties buy the shares

in consequence of the falsehood, I should feel no difficulty in saying that in such a case an action is maintainable."

In the observations of *Pollock*, C. B., as reported in 29 L. J. Ex. p. 65, it is stated: "Generally a false and fraudulent statement must be made with a view to deceive the party who makes the complaint, or at all events to deceive the class to whom he may be supposed to belong, although he may not be individually and particularly intended."

I cannot doubt that the defendants gave C., H. & C. this receipt to enable them to sell the 500 bushels of spring wheat referred to therein by producing the receipt to the persons to whom they offered to sell, and intended that they should do so, and I think by this sufficient privity is established between the plaintiff, who purchased on the faith of the defendants' representations, and the defendants to enable him to sue them for the injury he has sustained, by relying on false and fraudulent representations, contained in the receipt, and to recover damages therefor, and I further think this is sufficient to estop the defendants from denying that they had the quantity of wheat in store they represented by the receipt that they had at the time it was given. On the view I take of the law and evidence, I think the verdict for the plaintiff can properly be sustained on the first count.

As to the second and third counts, I think the facts well warrant the verdict. The jury, I take it under the direction of the court, have found that the 500 bushels of wheat were received by the plaintiff absolutely, and not as a security, and that the property in this wheat was intended to be transferred to him. The evidence clearly shews that the statement in the receipt of their having received in store for C., H. & Co. 500 bushels of wheat was false in fact and to the knowledge of the defendants, and under the authority of the cases referred to for the purposes of this case, that statement must be considered fraudulent also.

As to the second and third counts the verdict seems to me warranted by the evidence.

It now remains to consider the demurrers to the second and third counts.

The third count alleges that the defendants falsely and

fraudulently represented in writing that they had received in store for C., H. & Co. 500 bushels of spring wheat, and they knew at the time they made such false representations, that by the course of trade in this province, such representations would be, and were by them intended to be, relied upon by any person dealing with Clarkson, Hunter & Co., to evidence the possession of the said wheat by the defendants for C., H. & Co., and that C., H. & Co. had the right to sell and dispose of the same, and the plaintiff avers that relying on the representations so made by the defendants in the said receipt he purchased the said 500 bushels of wheat mentioned in the said receipt from C., H. & Co., whereas in truth at the time the defendants so made the said receipt they had not received the said wheat, nor any part thereof, in store for C., H. & Co., whereby the plaintiff lost and was deprived of the wheat so bought by him.

I think this count, though not very artistically drawn, may be sustained. There is the allegation, 1st, of the false and fraudulent statement in writing; 2nd, of the knowledge that by the course of trade the representations therein contained would be relied on by purchasers, and that they intended the purchasers of the wheat to rely upon such representations as shewing that they had the wheat in their possession for C., H. & Co., and that they had the right to dispose of the same. 3rd, of the purchase of the wheat by the plaintiff relying on the representations, whereas at the time they made the representations they had not received the wheat or any part.

I think the facts here spread out shew that the plaintiff relied on a false statement of the defendants, that they had 500 bushels of C., H. & Co.'s wheat in their possession; that in consequence the plaintiff bought the wheat, and as the defendants had it not, he was in consequence deprived of that which he purchased. If then there was sufficient privity the action will lie under the authorities referred to. The other facts shew sufficiently that the statement in writing was intended to be used and shewn to the purchasers of the wheat as evidence that it belonged to C., H. & Co., and the defendants had it in their possession.

As to the demurrer to the second count, which charges that

the defendants, although they had not received in store 500 bushels of spring wheat on account of C., H. & Co., *falsely and fraudulently* made and delivered to them a receipt for that quantity of wheat, whereby defendants *falsely represented* that they had received and then held that quantity of wheat for and on account of C., H. & Co., and as their property, *and thereby enabled* C., H. & Co. to *represent themselves to the plaintiff to be the owners* of the said 500 bushels of wheat in the receipt mentioned, and he, *plaintiff, relying* upon the receipt so given by defendants to C., H. & Co., *and the representations so made* by them (C., H. & Co.) in consequence thereof *that they were the owners*, and had *the right to sell* the said wheat, and that the defendants *had received* in store for and on account of them, the said C., H. & Co., the said 500 bushels of wheat, and then held the same on account of the said C., H. & Co., bought the said wheat from C., H. & Co., and took from them an assignment of the receipt as evidence of the purchase, and as an authority to defendants to deliver the wheat to plaintiff, whereas defendants had not when they granted the receipt the said wheat or any part thereof in store for C., H. & Co., and the defendants refused to deliver the wheat to plaintiff, whereby he was deprived of the same.

I incline to the opinion that this count is bad on several of the grounds taken in the demurrer. 1st. It is not alleged that defendants knew what use C., H. & Co. intended to make of the receipt. 2nd. Or that defendants intended to deceive plaintiff or any other person. And, 3rd, which I think a still stronger ground, that it is not alleged that the receipt was given by defendants to enable C., H. & Co. to deceive plaintiff or any other person. 4th. It is not alleged to whom the false representation was made, if to C., H. & Co., it is not alleged that they were not aware that at the time the receipt was given there was not the quantity of grain there expressed in defendants' warehouse. From any thing that appears in the declaration the false and fraudulent representation may have been made for the purpose of deceiving C., H. & Co. There is nothing to shew they intended to deceive any one else, or to aid C. H. & Co. in

doing so, or intended they should do so. There is nothing in the nature of the instrument itself that would shew independent of other facts that it would be used by C., H. & Co. to enable them to sell grain, or that third parties would be likely to be interested in the representations therein made. It is not shewn that there was any duty cast on defendants in relation to these receipts. It is not alleged that they are warehousemen; nor is it in any way shewn that defendants contemplated or intended that the instrument would be used by C., H. & Co. with third persons to induce them to purchase the grain mentioned in the receipt, so that there is that want of privity which is requisite according to several of the cases referred to.

Judgment for the defendants on demurrer to second count, and for the plaintiff on the third count.

The plaintiff is at liberty to enter his verdict on the first and third counts if he desires, for the full amount, or on the first count for the \$215, and for the balance on the third count.

The CHIEF JUSTICE added:—I think, independent of the receipt, there was sufficient evidence that there were (say) 250 bushels of wheat in defendants' hands belonging to Clarkson, Hunter & Co., and that Clarkson, Hunter & Co. sold that specific wheat to plaintiff, and that the defendants refused to deliver that specific wheat to the plaintiff on demand, requiring that their receipt should be given up before they would deliver any. They had no other wheat but this particular lot. To that extent I think the plaintiff entitled to recover on the first count, and for the residue on the third count.

Per cur.—Judgment accordingly.

DIGEST

OF

CASES REPORTED IN VOL. XI., BEGINNING HILARY
TERM 24 VIC., ENDING MICHAELMAS TERM, 25 VIC.

ABANDONMENT.

Of contract—See AGREEMENT, 2

ACCEPTOR.

See BILL OF EXCHANGE, 1, 2, 3, 4.

ACCOMMODATION.

Acceptance—See BILL OF EXCHANGE, 3.

ACCORD AND SATISFACTION.

See REPLEVIN, 1.

ACTION.

Notice of against school trustees.
—See SCHOOL, 1.

ADMINISTRATION.

See BOND, 2.

ADMINISTRATOR.

Action by against railway company for death of deceased.—See RAILWAY, 5.

AFFIDAVIT.

Of merits in an interpleader issue.
—See INTERPLEADER, 2.

AGENT.

See ARBITRATION, 1.—PRINCIPAL.

AGREEMENT.

See ATTORNEY.

For sale.—See REPLEVIN, 1.

1. *Agreement*—*For sale and purchase of land*—*Covenants*—*For payment of money, not dependent upon fulfilment of covenants for title.*—In an action on a covenant for interest due on an agreement for the sale and purchase of land, defendant pleaded, that the plaintiff, at the time of the sale and purchase had not, nor had he at any time since, a good and sufficient title to the land, and consequently plaintiff had no right to call upon defendant for payment. 2nd, that plaintiff ought to have been ready and willing to convey to defendant an estate in fee simple before he was entitled to call upon defendant for payment. 3rd, that the covenants were mutual and dependent, and plaintiff must be in a position, and ready and willing to convey by good title before calling on defendant for the purchase money; that plaintiff hath not, and never had any title to the land. Upon demurrer, *held*, that the covenants are independent of each other, and that the defendant

is responsible on his covenant, notwithstanding the plaintiff's inability to perform his. *Tisdale v. Dallas*, 238.

2. *Agreement for sale of land—Installment of purchase money paid—Abandonment of contract—Right to return of purchase money paid on agreement.*—B. agreed to sell certain land for which A. paid £50 down, and undertook to pay the balance in certain instalments, which, however, he failed to do, and the contract was abandoned, B. agreeing verbally, that if he could sell the land for more than the original agreement between A. and himself, to repay him the £50 paid on the original agreement. *Held*, that the abandonment of the contract was not proved to be the consideration for defendant's promise, and that there was no other consideration proved sufficient to maintain an action for the £50. *Campbell v. Greer*, 231.

3. *Agreement for sale of land—"Peaceable possession to be had" not a continuing contract—Crown sale—Evidence required to shew sale cancelled.*—Plaintiff purchased from defendant two lots of land, taking the following receipt for the money paid: Received, Goderich, 16th June, 1857, from A. C., in promissory notes and otherwise, the sum of £200 cy. for transfer of lots 11 & 12, in the 8th concession of the township of Turnberry, to be procured from the original locatee on or before one month from this date, and peaceable possession to be had of the land or the consideration of transfer to be returned. R. had purchased from the Crown in 1854. He assigned to defendant, and defendant to the plaintiff, who went into possession, but one F. immediately claimed one of the lots, and forbade him from working on

it, whereupon the plaintiff desisted. The plaintiff soon afterwards, with defendant's consent, arranged verbally with one M. to assume his bargain, and M. went into possession in January, 1858, and remained until October, 1859, paying three instalments to the Crown in plaintiff's name. It was shewn that in November, 1854, two months after the date of R.'s purchase, a receipt was given by the Crown to H. for this lot, treating him as the purchaser, and it appeared at the trial, but by verbal evidence only, that in April, 1859, the Commissioner of Crown Lands decided in favor of H., and that he should pay M. for his improvements, which he had done. M. in consequence gave up possession, and the plaintiff then sued defendant as for a breach of the agreement for quiet possession. *Held*, that he could not recover, for, 1st, the contract was not a continuing one, but was satisfied when the plaintiff obtained peaceable possession; 2nd, when H. warned off the plaintiff he had himself no right; and, 3rd, there was no sufficient evidence that the sale to R. had been effectually avoided. *Cochrane v. McDonald*, 202.

ALLEGATIONS.

In declaration on an administration bond.—See BOND, 2.

AMENDMENT.

Of judgment roll.—See PRACTICE.

APPEAL.

Books.—See BAIL.—EVIDENCE.

ARBITRATION.

1. *Reference—Order of—Counsel—Authority to bind by undertaking—Agent of defendant's attorney—As such power to bind defendants—Award*—The rule for a reference in this cause was granted on reading the consent to refer endorsed on the record at *nisi prius*; it stated that the cause and all matters in difference between the parties should be referred to S. C., and among other things, stated that the evidence as taken before the judge at *nisi prius* should be read before the arbitrator, and that any question of law which should arise, at the request of either party should be referred to the court, and costs of cause, reference, and of the award to abide the event. The order of reference as made a rule of court differed from the above memorandum, in these among other things—1st by directing that costs &c., should be in the discretion of the arbitrator. 2nd, that the arbitrator should not be required to reserve any legal questions for the decision of the court. Messrs. W., P. & B. acted throughout this matter as agents for the defendant's attorney, all the papers in the suit being served upon them; and W., one of the members of the said firm, was counsel for defendants in the cause both at *nisi prius* and before the arbitrator. It was proved that on an undertaking of W. as counsel for defendants not to raise any question of law the terms of the reference were altered as above by consent of W. and of counsel for the plaintiffs. On motion to set aside the award and final judgment, *held*, that W. had power and authority either as counsel or as agent for the defendants' attorney in his discretion in the matters in this suit to bind the defendant; and

that accordingly defendants were bound by his (W.'s) undertaking as above, and the award must therefore be upheld. *Wilson et al. v. The Corporation of the United Counties of Huron and Bruce*, 548.

2. *Submission—Award—Action in debt on—Plea of nunquam indebitatus.*—The parties to this suit executed a submission agreeing to leave to the arbitration of certain persons the matters in difference between the parties, stating in the alternative what the arbitrators where by their award to direct, either, that the defendants should at a short period deliver up the premises, or that a lease should be executed between the parties, embodying certain stipulations in the submission set forth; under which the arbitrators awarded that a lease should be executed, and proceeded to direct that should it be deemed necessary for the mutual benefit of the parties, that during the term certain work should be done, the said defendants should pay one-fifth part of the expenses thereof, not stating in terms that this should be a stipulation contained in the lease. The plaintiff having performed certain works upon the premises for the mutual benefit of himself and the defendant brought debt on the award to recover one-fifth part of the expenses incurred thereby, to which the defendants pleaded never indebted. *Held*, that the plea of *nunquam indebitatus* put the submission in issue. That the arbitrators exceeded their power in ordering defendants to pay, &c. They should, according to the submission, have directed a lease to be executed between the parties containing a stipulation to that effect. *Abbott (Plaintiff) Appellant v. Skinner et al. (Defendants) Respondents*, 309.

ARREST.

See BILL OF EXCHANGE, 4.—TRESPASS, 1.

ARTICLED CLERK.

See ATTORNEY.

ASHBURTON TREATY.

Warrant of Commitment—Form of omitting the words "murder" and "with malice aforethought."—*Held* that a warrant of commitment issued by a magistrate under the Ashburton treaty and our statute (Con. Stat. of Canada, c. 89) which used the words "did wilfully, maliciously, and feloniously stab and kill," and omitted the words "murder," and "with malice aforethought," and concluded by instructing the gaoler to "there safely keep him (the prisoner) until he shall be thence delivered by due course of law," did not come within the provisions of the treaty or statute, and was consequently defective. *Held*, also, that when a prisoner was brought before the court upon a writ of habeas corpus under our statute, the warrant of commitment upon which he was detained, appearing on its face to be defective, the court, before whom such prisoner was brought, had no authority to remand him, such power only being possessed by the court at common law, and the prisoner not being charged with any offence for which he could be tried in this province. *In re John Anderson*, 9.

ASSESSMENT.

Crown lands—Un-patented—Assessments on—Plaintiff in the year 1853 purchased certain Crown lands through the Crown lands agent at Chatham, taking a receipt for the first instalment then paid, which

stated, among other things, that in case any other person should have any claim for improvements, the sale should be cancelled; also that no timber was to be cut on the premises in question except for the improvement thereof without the consent of the Crown land agent or first paying the purchase money in full. In January, 1854, the commissioner of Crown lands, in supposed compliance with stat. 16 Vic., ch. 182, sec. 48, transmitted a list to the registrar of the county, (in the statement of case set out.) Plaintiffs paid all the instalments on the lands as they became due, but no patent, lease or license of occupation has been granted for the said lands, and the title thereto has always been vested in her Majesty. The only right in plaintiff being that evidenced by the receipt, &c. The lands have never been in the actual possession or occupation of any person whomsoever, and the plaintiff has always resided out of the county in which they are situate. In the years from 1854 to 1859 inclusive, the lands were assessed for taxes, which not being paid the treasurer issued his warrant, and they were advertised accordingly. To prevent the sale being carried out, the plaintiff, under protest, paid the amount claimed for the assessments. *Held*, 1st, that statute 16 Vic., ch. 159, sec. 24, (Con. Stat., ch. 22, sec. 27) (since repealed,) was not intended for Upper Canada. 2nd, that sec. 13 Con. Stat. U. C., ch. 22, was mandatory and not permissive, and that a license of occupation should be issued to every persons wishing to purchase, lease or settle on any Crown land. 3rd, that the lands in question were not subject to assessment as they were vested in the Crown, no license of occupation,

lease or patent thereof having been granted by the Crown. *Street v. The Corporation of the County of Kent*, 255.

ASSIGNEE.

Of railway stock.]—See RAILWAY, 4.

Liability of, on default of covenant.]—See COVENANT, 3.

ASSIGNMENT.

See PROMISSORY NOTE, 8.—RAILWAY, 4.—LEASE, 7.—BILL OF EXCHANGE, 5.

Of covenant.]—See COVENANT, 3.

Preferential.]—See CHATTEL MORTGAGE, 4.

Assignment—Registry of—Consideration in—How far necessary to shew the consideration in the registered instrument.]—*Held*, that an assignment (registered under the statute) for the money consideration of five shillings, with a separate declaration of trust referred to and forming part of the instrument (not registered) was invalid, and that the conveyance registered must shew the true and full consideration for which it is given. The decision in *Arnold v. Robertson*, 8 C. P. U. C. 147, affirmed. *Hugh Fraser and Matthew Crooks Cameron v. John Gladstone and Alex. Morrison*, 155.

ATTACHMENT.

See GARNISHEE.

Attachment—Judgment—A debt attachable before judgment—Attachable after.]—*Held*, that the recovery of a judgment upon a debt which was attachable prior to such judgment being recovered, did not

render it less attachable after such judgment recovered. *McKay v. Tait et al.*, (*Howcutt, Garnishee*), 72

ATTORNEY.

Power of to arrest.]—See TRESPASS, 1.

Attorney and articulated clerk—Agreement for partnership during articles—Stat. 22 Geo. II., ch. 46—Action not maintainable on.]—An attorney entered into an agreement with an articulated clerk to take him into partnership at the expiration of his articles, and that his share in the profits should commence from the date of his articles; the evidence did not show that the clerk had been admitted. A mutual separation took place upon a disagreement, and an action was brought for compensation for services. Upon a verdict for plaintiff under the learned judge's charge, *held*, that the case came within the provision of 22 Geo. II., ch. 46, which is in force in the province although repealed in England, and that the action was not maintainable. *Jas. Dunne v. Miles O'Reilly*, 404.

2. *Attorney—Negligence—Breach of contract—Action for—Not necessary to prove substantial damages—Measure of damages.*]—An attorney having been employed by a client to register a mortgage of £250, and his fees and disbursements paid, took upon himself to withhold the mortgage till he recovered and registered a judgment of £16 13s. 4d. against the mortgagor, by which the land mortgaged was bound, and subsequently sold under it. Upon an action brought for neglect, *held* that the action being substantially for a breach of contract, it was maintainable without shewing any actual damage, and a nonsuit

(which was moved for) could not be entered; while the decision of the case was pending before the court, the plaintiff, upon payment of \$300, discharged the mortgage on registry, and thereby prevented the court from doing substantial justice; the case was in consequence remitted to another jury to decide as to the *mall* or *bona fides* in obtaining the discharge. *Quere*, would not the amount of the judgment with interest, costs, &c., be the measure of damages in the action. *Doan v. Warren et al.*, 423.

— AUCTIONEER.

Auctioneer—Contract with—Bidder—How far auctioneer is bound to accept all bids indiscriminately.—An auctioneer is not bound to accept all bids, as a matter of course, from persons present at his auction. An action, therefore, will not lie for refusing to accept such bids unless by reason of some special condition or terms of the sale. *Holder v. Jackson*, 543.

— AUTHORITY.

For breach of covenant.—See LEASE, 1.

To set up Jus tertii.—See TRESPASS, 3.

— AWARD.

See ARBITRATION, 1, 2.—CONTRACT, 1.

— BAIL.

Bail bond—Custody of debtor when bond taken—Appeal books—Setting down for argument.—On an action on a bail bond given by the defendant S. and two others as sureties for him, with the usual conditions, it was contended on the

part of the defendant that the bond was void, as the defendant S., while he was in close custody under the writ, and when the bond was executed, was not a debtor confined in the gaol of the county upon execution, &c. *Held*, that it is not necessary that a debtor be actually conveyed to gaol before bail can legally be taken by sheriff. Appeal books in this cause were set down for argument during Michaelmas Term, (on a decision given the previous county court term,) which were defective, and the court refused to hear the cause on that account, but no motion was made by the respondent's counsel to strike out the appeal; the appellant then set down the case to be heard the following term, which coming on for argument, the respondent's counsel moved to dismiss the appeal peremptorily, and the court refused the motion. *Draper, C. J.*, being of opinion that if time allows the case should be set down for argument during the term succeeding that in which the decision of the court below was given, but no formal judgment was given on the point. *Smith et al. (Appellants) v. Foster, (Respondent)*, 161.

— BIDDING.

See AUCTIONEER.

— BILL OF EXCHANGE.

Bill of exchange—Acceptor resident in Lower Canada—Statute of Limitations—How far entitled to set up under a plea of payment—Stat. 12 Vic., ch. 22, sec. 31.—*Held*, that the period of limitation provided by the statute (12 Vic., ch. 22, sec 31) relative to debts due in Lower Canada must be specially pleaded, and that the limitation thereby created cannot be

proved under a plea of payment. *Held*, also, that the judge of the county court has power to allow pleas to be added in cases sent down from the superior courts to be tried by him, as well as in actions commenced in his own court. *King v. Glassford*, 490.

2. *Bill of exchange—Recovery of judgment against the drawer and acceptor—How far an answer in a subsequent action against the endorser.*—Upon an action brought by the endorsee against the (3rd) endorser of a bill of exchange, *held*, that the signing of final judgment in a previous action on the same bill of exchange in which all parties thereon were sued and served, (and judgment of *non pros* not signed or a discontinuance entered as to any,) but the special endorsement, and judgment obtained thereon, only shewed a cause of action against the drawer and acceptor, did not prevent the subsequent recovery in a separate action against the endorsers. *Bank of Upper Canada v. Lizars*, 176.

3. *Bill of exchange—Accommodation acceptance by one of a firm—Partnership bound—Release of drawer—Not a discharge of acceptor.*—On an action by plaintiffs, endorsees for value, against a firm of M. and C., on a bill of exchange drawn by W., S. & Co., in their own favour, accepted by the defendants and endorsed by W., S. & Co. to plaintiffs, the defendant C. pleaded that the bill was accepted by his partner M. as an accommodation for W., S. & Co., and was therefore not within the scope and objects of the partnership business. Also *equitably* that plaintiffs after the bill had matured, having notice of the accommodation acceptance, agreed with W., S. & Co., the drawers, without the consent of

defendant to accept a composition from W., S. & Co., which composition was paid plaintiffs, who thereupon discharged W., S. & Co. from liability, and that defendants were discharged in *equity* thereby. On demurrer, *held*, 1st. That the assent of a firm is to be presumed by the use of the name of the firm by one of the partners—that the *onus probandi* rests on those seeking to rebut the presumption. 2nd. That the holder of a bill for value notwithstanding his having subsequently become aware of its being an accommodation bill, may release the drawer without releasing the acceptor. *The City of Glasgow Bank v. John Muir Murdock and Edward Currie*, 138.

4. *Bill of exchange—Judgment thereon against drawer and acceptors—Arrest of one defendant on ca. sa.—How far a satisfaction.*—The arrest on a *ca. sa.*, and subsequent discharge of one of several defendants by the plaintiffs, upon an action against the drawer and acceptors of a bill of exchange, *held*, not to be a satisfaction of the judgment, so as to prevent the subsequent issue of a *fi. fa.* thereon against the other defendants. 2nd. That the arrest and discharge of the acceptor of a bill of exchange, operating as far as he is concerned as a discharge from the debt, the drawers are thereby prejudiced, and entitled to remedy. *Hamilton et al. v. Holcomb et al.*, 93.

5. *Bill of exchange—Surety—Assignment—Reservation of rights against sureties—Discharge—Pleading.*—Declaration upon four bills of exchange of £500 each, drawn by R., H. & Co., upon one J. C., payable to and endorsed by defendant. The defendant pleaded, 1st, payment. 2nd, an assignment made by J. C. to one T. P., for the benefit

of his creditors with plaintiffs' assent and concurrence, and that T.P. with the consent of J. C. and his other creditors, conveyed and assigned certain property to the plaintiffs, and plaintiffs accepted such conveyance and assignment in full satisfaction of the causes of action in the declaration. The plaintiffs replied upon equitable grounds that the property assigned was not equal to the whole of J. C.'s indebtedness to plaintiffs, and that plaintiffs accepted the same on account of such indebtedness with defendant's assent, and that the proceeds of such estate are still applicable to pay a portion of the causes of action against defendant, to wit, £500, with a *nolle prosequi* as to that portion; and defendant promised to pay the residue of defendant's indebtedness to plaintiffs over and above the said £500. Upon demurrer, *held*, that the executing of an assignment by a holder of a bill without a special reservation of rights as to surties, discharges them, and that the pleadings shewed it was the plaintiffs' duty duly to administer the assets of J. C. in their hands to be applied upon the bills declared on, and until they had done that no cause of action accrued against the defendant. For all that was shewn by the pleadings, the assets in plaintiffs' hands might cover the bills sued upon, and therefore the replication was bad. *The Commercial Bank of Canada v. Wilson*, 581.

BILL OF SALE.

See INTERPLEADER, 1.

BOND.

See BAIL.—EJECTMENT, 1.—SURETY, 2.

By executors.—See PROMISSORY NOTE, 7.

1. *Bond—Joint and several.*—G. B., J. P., J. H. W., S. S. McD., J. C., J. F., and J. B. L. entered into a bond to the municipal corporation of the county of Essex, as follows: We G. B., &c., are jointly and severally held and firmly bound, &c., unto, &c., in the several penal sums of money hereinafter mentioned, that is to say, the said G. B. in the sum of £3,000, the said J. P. in the sum of £500, the said J. H. W. in the sum of £500, (and all the rest in similar sums of £500 each,) for which several payments to be well and truly made, we and each of us bind our heirs, executors and administrators," &c. *Held*, to be a several and not a joint or joint and several bond. *Corporation of Essex v. Bullock et al.*, 323.

2. *Treasurer of corporations—Separation of counties—Surties.*—

A treasurer having been duly appointed for three counties, (while united,) upon the separation of one from the other two counties, *held*, that a new appointment was not necessary. *Consol. Stat. U. C.*, ch. 54, sec. 159, 174, 51. An action being brought by a corporation against the sureties of their treasurer, the defendants contended that because money which had been collected by the treasurer and fraudulently charged as paid by him was not demanded by the parties (the government) entitled thereto, they were not responsible therefor. *Held*, that the liability of the treasurer was between the municipality and himself, he having received the money as their officer, and his responsibility was not altered by the government not demanding the money. *Corporation of Essex v. Park*, 473.

3. *Bond—Administration—Liability of administratrix thereunder—Suit brought against her after marriage, on bond executed when sole—Joinder of husband—Allegations necessary in declaration—Married Woman's Act.*—The plaintiff declared upon a bond dated the 4th of June, 1858, made by the defendant, Letitia Ross, and two others, without her husband, when sole and unmarried, by the name of Letitia Macaulay, to his excellency the Governor-General and his successors for £300, conditioned for the due administration of the estate of Andrew Macaulay, alleging the issue of letters of administration, that goods and chattels of Andrew Macaulay, amounting to £350, came into her hands to be administered, 1st July, 1858, that she wasted the same and disposed thereof to her own use; that the bond was assigned to the plaintiff as trustee for the next of kin, by order of the judge, who thereupon became entitled to sue thereon, &c. After assessment of damages on judgment by default, *held*, on motion by the defendants James and Letitia Ross in arrest of judgment, that the case came within the 18th sec. of the Married Woman's Act, and that her husband was properly joined, and that it was necessary to allege that the cause of action accrued before marriage, and that she has separate estate. The court was therefore of opinion that the judgment should be arrested, unless the plaintiff was allowed within one month, on motion for that purpose in chambers, to add the necessary suggestions to the declaration under the 217th sec. of the Common Law Procedure Act. Such amendment or addition not being allowed unless the plaintiff, on affidavit, shews reasonable

ground for believing that the final decision of the suggestion will be in his favour. *Kirchhoffer v. James Ross and Letitia, his wife, et al.*, 467.

4. *Bond—For conveyance of land—Choosing of land—Preparing deed—Whose duty.*—Declaration on a bond conditioned that defendants should on a certain day, or before, if they obtained a title, convey to plaintiff a certain quantity of land in one of two counties in one of the United States, to be taken from land to be located by defendants. Demurrer on the ground that it was plaintiff's duty to have selected the land and tendered a conveyance *Held*, that the defendants, having bound themselves before a certain day, to make a conveyance, if they obtained a title they would be more cognizant of the time when the conveyance could be made; it was their duty therefore to convey and not to wait till plaintiff tendered a deed. *Thayer v. Street et al.*, 243.

BOUNDARY.

Line.—See *SURVEY*.

BREACH.

Of covenant.—See *LEASE*, 1.

BROKERS.

See *PROMISSORY NOTE*, 5.

BY-LAW.

See *LEASE*, 2.—*SCHOOL*, 2.

1. *By-law—Quashing of—Corporation—Ordinary expenditure of—Power to dispose of funds.*—On motion to quash by-laws 68 and 69, passed by the corporation of the village of Newmarket, on the 5th of August, 1861. The first, after reciting that it is necessary that

the corporation should purchase a site for a town hall, enacts that they purchase a certain parcel for the sum of \$250. Secondly, that the reeve should issue his draft for the said sum, payable the 1st of November, 1861. The second, (No. 69,) after reciting that the inhabitants of the village are desirous of erecting a town hall, and that there will be a large surplus in the hands of the corporation after paying for the site, and paying the ordinary expenses of the village for the year, enacts that \$750 be appropriated for the erection, and that the reeve should issue his drafts, payable the 1st of November, 1861. At the time of passing these by-laws there had been no by-law passed to provide for the ordinary expenditure of the year. On motion to quash, *held*, that the corporation has no power, without the consent of the electors, to authorise the expenditure of money for purposes not falling under the head of ordinary expenditure, without having the money in hand to meet the demand, and without making provision by rate or otherwise to raise the required amount to meet the demands when they become due. *McMaster v. The Corporation of Newmarket*, 398.

2. *By-law—Tavern license—Action for breach of—Forfeiture.*—Action for illegally depriving plaintiff of his tavern license. The defendants pleaded, that plaintiff carried on business under a by-law, the provisions of which he had infringed, and thereby his license became forfeited. Demurrer, that defendants had no power to pass such a by-law. *Held*, that no action can be brought for the infringement of a by-law till one month after it has been quashed.

Smith v. The Corporation of the City of Toronto, 200.

CALLS.

Liability of stockholder of railway company for.—See RAILWAY, 1, 4.

CAPIAS AD SATIS- FACIENDUM.

See BILL OF EXCHANGE, 4.

CAPITAL.

In a railway company, necessity of its being subscribed for in full before liable for calls.—See RAILWAY, 1.

CERTIFICATE.

Power of judge of county court to give for immediate execution.—See IMMEDIATE EXECUTION.

CHANCERY.

Decree in on a question of usury.—See EJECTMENT, 4.

CHANGE.

Of possession.—See CHATTEL MORTGAGE, 1.

CHATTEL.

Property when it passes on an agreement for sale.—See REPLEVIN, 1.

Chattel property—Joint tenants in—Conversion by one—How far an action can be maintained by co-tenant.—One of two joint tenants of a chattel is not liable in trover at the suit of his co-tenant for a sale of his chattel not in market overt. The plaintiff and one F. being joint owners of a vessel, F. causes it to be registered in his own name, and sells and conveys her to a purchaser who disposes of her. Upon an action brought against F. and

his partner in business (who appeared to claim no interest in the vessel) a verdict being found for both defendants, the court, as the verdict was against the judge's charge, granted a new trial, costs to abide the event. *McNabb v. Howland et al.*, 434.

CHATTEL MORTGAGE.

1. *Chattel mortgage—As security against endorsements or contingent liabilities—Delivery—Change of possession—Accruing of debt within one year.*—*Held*, that a chattel mortgage given to secure the mortgagee against endorsements or contingent liabilities, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession, must be registered, and the liability for which it is given must accrue due within one year from its date. *Turner et al. v. Mills et al.*, 366.

2. *Chattel mortgage—Registry of—Operation of, by registry, to date.*—*Held*, that the registry of a chattel mortgage does not cause it to operate and have relation back to its date, therefore a writ placed in the sheriff's hands between its date and registry takes precedence of it. The decision of this court in *Feehan v. The Bank of Toronto*, (vol. 10,) affirmed. *Haight, Defendant, (Appellant,) v. McInnes, Plaintiff, (Respondent,)* 518.

3. *Chattel mortgage—Description of goods covered thereby—Statute 20 Vic., ch. 3, sec. 4.*—The property covered by a chattel mortgage was described as "The goods, chattels, furniture, and household stuff expressed in the schedule hereunto annexed," which schedule was headed, "An inventory of goods and chattels in the possession of

one J. R.," on a certain day. It proceeded to mention certain rooms and the articles therein contained—then jewellery, blankets, household linen silver, &c., &c., the locality of the house in which the goods, &c., were contained not being mentioned. *Held*, a sufficient description of the goods and chattels intended to be covered by the mortgage under the authority of previously decided cases referred to in the judgment of the court. *Powell v. Bank of Upper Canada*, 303.

4. *Chattel mortgage—Taken as part security for the purchase money of the property—How far within the statute for avoiding preferential assignments—Consol. Stat. U. C., ch. 26—Refiling not necessary when possession of the property is obtained within a year.*—One A. sold to B. his interest in certain land, there being an amount due thereon to obtain a title, part of which A., and the remainder B. was to pay, B. giving to A. certain personal property to the value of £100, and among it the horse in question in this suit for his interest in the land; but to secure the payment by A. of his share of the amount due on the land, (£42 19s. 4d.,) B. took from A. a chattel mortgage on the horse, which was duly filed. An execution having issued out of the division court against A., the horse was sold under it and purchased by the plaintiff, B. being present and protesting against the sale. B. subsequently got peaceable possession of the horse, and the action of replevin was brought to obtain possession of it from him, the plaintiff claiming it under the division court sale. *Held*, 1. That the transaction was not void as being a preferential assignment under the 18th section of the Consol. Stat. U. C., ch. 26, it being a contemporaneous

security for the purchase money of property taken at the time of the sale. That possession having been taken under default in the mortgage within a year from its filing, refiling for the protection of B.'s security was not necessary under the statute. *Ross, Plaintiff, (Appellant,) v. Elliott, Defendant, (Respondent,)* 221.

CLERK.

Articled.]—See ATTORNEY.

Of council, power of, and under the Municipal Institutions Act.]—See LEASE, 2.

COLLECTOR.

Of school rates.]—See SCHOOL, 1.

COMBINATION.

See PATENT, 2.

COMMITMENT.

Warrant of.]—See ASHBURTON TREATY.

COMMON COUNTS.

See PROMISSORY NOTE, 5.

COMMON LAW PROCEDURE ACT.

See BOND, 2.—CONTRACT, 2.

COMPANY.

See RAILWAY, 1.

CONDITION.

Precedent.]—See CONTRACT.—COVENANT, 2.—PROCLAMATION.—PROMISSORY NOTE, 8.

Subsequent.]—See EJECTMENT, 5.

On insurance policy.]—See INSURANCE.

Written across the face of a policy how far to prevail over printed portion.]—See POLICY.

CONSIDERATION.

See AGREEMENT, 2.

In assignment.]—See ASSIGNMENT.

In chattel mortgage.]—See CHATTEL MORTGAGE, 4.

CONSIGNEE.

Of goods, responsibility for transportation.]—See DEMURRAGE.

CONSTRUCTION.

Of lease.]—See LEASE, 1, 6.

CONSTRUCTIVE.

Arrest.]—See TRESPASS, 1.

CONTINGENT.

Liability.]—See CHATTEL MORTGAGE, 1.

Remainder.]—See WILL.

CONTRACT.

See LEASE, 5.—PRINCIPAL.—AGREEMENT, 2.—AUCTIONEER.—PROMISSORY NOTE, 2.

Continuing.]—See AGREEMENT, 3.

Breach of.]—See ATTORNEY, 2.

Contract—Condition precedent—Award—Pleading.]—The first count of the declaration alleged that by an indenture, dated the 2nd December, 1858, and made between plaintiffs and defendant, plaintiffs agreed to provide materials, &c.,

and construct and complete certain work on certain sections of the Toronto and Hamilton Railway, the work to be finished according to plans and specifications, and to the satisfaction of the defendant, and of the chief engineer of the H. & T. Ry. Co., to be completed by the 15th November, 1854. And defendant agreed to pay plaintiffs in certain manner and proportions, retaining a percentage till it amounted to £6,000, which sum was to remain in defendant's hands till the completion of the work with a further agreement that if at any time during the continuance of the work it should appear that the progress was not such as to ensure the completion thereof within the time limited, the defendant might take the same out of the plaintiffs' hands and re-let the same or employ additional men, &c., and complete the same, in which event plaintiffs were to forfeit the per centage; and also that defendant should have power to alter the course of the railway, &c. Averment that plaintiffs commenced the work, and before completing it, by articles of agreement dated the 16th of December, 1854, made between plaintiffs and defendant, after reciting the former agreement, and that every stipulation, covenant and agreement therein should remain in force &c., the plaintiff promised in all respects to execute the works on the sections by certain days therein specified; and if plaintiffs were not authorised before the 1st of January, then next, by defendant's agent to proceed with certain work therein mentioned, a certain extension of time should be allowed therefor. Averments, that plaintiffs immediately proceeded to the performance of the contract, and were then prepared to execute and

complete the same, but were stopped by defendant in the exercise of the power in him vested, whereby plaintiffs were hindered, &c., &c. Further averment that after the execution of the agreement, and before the time limited, &c., defendant unnecessarily, &c., hindered and delayed plaintiffs, &c., and defendant wrongfully and fraudulently hindered and delayed the plaintiffs, &c., by means of which wrongful hinderance, &c., plaintiffs were put to great extra trouble and expense. Yet they performed the work in accordance with the plans and specifications, &c., and defendant accepted and received the same from the plaintiffs. And the engineer, &c., wrongfully and fraudulently gave wrong monthly estimates, &c., and defendant wrongfully procured false and untrue final estimates to be given. Averment, that more than ten days before the commencement of the suit the sum of £10,000 was due from the defendant to plaintiffs for work, and £2,500 bonus mentioned in the agreement, whereof defendant had notice, &c. Pleas,—Never indebted, payment, set-off, that he did not hinder and delay, and not guilty. A verdict was taken by consent for £8,000, subject to the award of arbitrators to whom all matters were referred. The arbitrators awarded non-performance by plaintiffs of the work by the time specified. That the amount paid by defendant exceeded the amount of the engineer's estimates and bonus of £2,500. That defendant had not paid the amount due before the commencement of the suit. Upon reference to the court by the arbitrators upon the facts, *held*, that if the plaintiffs were claiming damages because of the wrongful and fraudulent acts, the award had rejected such claims.

Held, also, that the second contract did not alter or annul the condition precedent to the plaintiffs' right to be paid on the first contract, and the arbitrators having found that they did not complete the work within the time specified, the defendant was entitled to a verdict upon the first count, but that the subsequent acceptance of the work by the defendant entitled the plaintiffs to recover on the common counts. *Brown v. Wythes*, 561.

CONVERSION.

By one of two joint tenants.]—See CHATTEL.

CONVEYANCE.

Of land.]—See BOND, 3.

CONVICTION.

See PROCLAMATION.

Return of by magistrate.]—See MAGISTRATE.

CORPORATION.

See BY-LAW, 1.

Treasurer of.]—See BOND, 1.

COSTS.

See COVENANT, 1.

Of foreclosure—Recovery of against assignor.]—See MORTGAGE, 3.

Revision of.]—See PRACTICE.

COUNSEL.

Authority of to bind client.]—See ARBITRATION, 1.

COUNTIES.

Separation of.]—See BOND, 1.

COUNTY COURT.

See IMMEDIATE EXECUTION.

COURT.

Power of to amend by laws under the Municipal Institutions Act.]—See LEASE, 2.

COVENANT.

See AGREEMENT—LEASE, 1.

To repair.]—See LEASE, 3.

*Covenant against acts of covenantor—Costs.]—A. having mortgaged a lot of land to B., subsequently sold it to C., giving covenants against his own acts. B. subsequently foreclosed his mortgage, making C. a party to the suit, who employed a solicitor and incurred costs to the amount of £10 9s. 10d., which he claimed in an action he afterwards brought against A. for breach of his covenant. *Held*, that the costs were incurred by the voluntary act of C., and were not a necessary consequence arising from a breach of the covenant, and were not recoverable against A. *Parker v. McDonald*, 478.*

2. *Covenant—Condition precedent—C. L. P. Act, sec. 106.]—Declaration stated that plaintiffs covenanted with defendants to do certain works within a limited period, and in a workman-like manner, &c., with power to defendant by six days' notice to take the works out of plaintiffs' hands in default of the rate of progress being sufficient to ensure the completion of the said works within the specified time. But omitting to set out the words, "It is also understood that the work is to be carried on unceasingly night and day with sufficient force to ensure its completion within the limited time." Averment, that*

though plaintiffs fulfilled the conditions precedent, the defendants did take the works out of the plaintiffs' hands without notice and without just cause, &c., whereby damages, &c. *Held*, on motion for nonsuit to be no variance, as by 106 sec. of C. L. P. Act, 1856, the averment of performance by plaintiff of conditions precedent, not denied by defendants, is sufficient. *Hennessey et al. v. Weir*, 179.

3. *Covenant—Assignment of—Liability of assignee upon default of covenantor—Damages—Pleading.*—The declaration claimed the sum of £1500, being the amount secured by mortgage, made by one Barton to defendant, and assigned by him with a covenant in the assignment that defendant should be personally liable for the due payment of all the moneys, and performance of the matters and things stipulated in the mortgage in case of any deduction, defalcation or abatement. Breach, that Barton did not pay the £1500 on the days appointed, but made default, and that defendant has not fulfilled his covenant. The defendant, besides pleading *non est factum*, pleaded pleas denying his indebtedness, except as to all moneys remaining due at the time of the assignment, and also after the assignment, but before the 25th December, 1860, and demurred to the declaration denying his liability merely on Barton's default, without shewing any means taken to recover the amount. *Held*, that the declaration was good, the assignment as stated in the declaration being large enough to pass all the debt secured by the mortgage, and it was not shewn to be in any part paid. 2nd. That the defendant's covenant bound him to pay all moneys secured by Barton upon his, B.'s, default. 3rd. That

the breach claimed no more than the plaintiff might possibly be entitled to upon the assignment and covenant. *Morson v. Hunter*, 585.

COVENANTOR.

In mortgage estopped from denying debt.—See MORTGAGE, 2.

CREDIBILITY.

Of party to suit as witness.—See WITNESS.

CREDIT.

Right of party to bring a second action for the same claim when defeated because it has not expired.—See GOODS.

CREDITOR.

Judgment.—See GARNISHEE.
Of railway company Liability of stockholder to.—See RAILWAY, 1.

CROPS.

Right of inchoate purchaser to.—See LEASE, 5.

CROSSING.

See RAILWAY, 1, 3, 5.

CROWN.*

Sale.—See AGREEMENT, 3.
Lands.—See ASSESSMENT.

CUSTODY.

Of debtor when bond taken.—See BAIL.

DAMAGES.

See COVENANT, 3.

Measure of, against an attorney for neglect.]—See ATTORNEY, 2.

Measure of, on a covenant to repair.]—See LEASE, 4.

DATE.

Of chattel mortgage, its operation back to by registry.]—See CHATTEL MORTGAGE, 2.

DEBT.

On award.]—See ARBITRATION, 2.
—**ATTACHMENT.**

Secured by mortgage.]—See MORTGAGE, 2.

DEBTOR.

See BAIL.

DEGREE.

In Chancery—Effect of in a suit on a mortgage.]—See EJECTMENT, 4.

DEED.

Of Land.]—See BOND, 3.
—**EJECTMENT, 1, 3.**

DEFAULT.

Verdict on an interpleader issue.]—See INTERPLEADER, 2.

DELIVERY.

See PRINCIPAL.

Under chattel mortgage.]—See CHATTEL MORTGAGE, 1.

Of deed.]—See EJECTMENT, 1.

DEMAND.

Of possession.]—See EJECTMENT, 1.

DEMURRAGE.

*Demurrage of vessel—Shipping—Transshipment of goods—Responsibility of consignee for.]—A. & Co. shipped some stone to B., in Ottawa, by vessel, to be transhipped at Prescott, and carried by the O. & P. Railway Company. A detention of eleven days took place at Prescott through the railway company, for which A. & Co. brought this action against B., claiming damages for the detention of the vessel. There being no evidence to shew that the consignee undertook more than to receive the stone at Ottawa, held, under the circumstances, that he was not responsible for the detention of the vessel. *McGreevy, (Defendant,) Appellant, v. Rathbone et al., (Plaintiffs,) Respondents, 186.**

DESCRIPTION.

Of goods in chattel mortgage.]—See CHATTEL MORTGAGE, 3.
In patent.]—See PATENT, 1, 2.

DEVISE.

See EJECTMENT, 5.—WILL.

DIRECTORS.

Provisional.]—See JOINT STOCK COMPANY.

DISHONOR.

Notice of.]—See PROMISSORY NOTE, 5.

DISORDERLY.

House.]—See TRESPASS, 2.

DISCHARGE.

See BILL OF EXCHANGE, 1, 5.

DISSOLUTION.

Of partnership—Fraud of partner after—Liability of co-partner therefor.]—See PROMISSORY NOTE, 6.

DISTRESS.

For taxes]—See REPLEVIN, 2.—SCHOOL, 1.

DIVISION COURT.

Division court—Title to land—Writ of prohibition]—Upon an application to prevent the judge of a division court from further proceeding with a plaint therein, *prima facie* proof of a title to land being given, and that such title must come in question, and no cause being shewn to the contrary, *held*, sufficient, and a writ of prohibition granted. *Macara v. Morrish*, 74.

DRAWER.

Of bill of exchange.]—See BILL OF EXCHANGE, 1, 2, 3, 4.

DRIVING.

Driving—Travellers overtaking others—Con. stat. U. C. ch. 56, sec. 2 & 3.]—Upon an action brought for damages occasioned by a traveller not turning out when overtaken on a public highway, *held*, that under sections 2 & 3 of ch. 56, Consol. Stat. U. C., the learned judge should leave it to the jury to decide whether the damage was occasioned by the misconduct of the defendant, or partly by the default of the plaintiff, as he in this case, not being able to turn out, did not stop as required by the statute. *Devlin v. Bain*, 523.

DUTY.

Of railway company in conduct of trains.]—See RAILWAY, 5.

EASEMENT.

See RAILWAY, 3.

EJECTMENT.

1. *Ejectment—Bond Conditioned for exchange of lands and deeds within a certain period—Delivery of deed—Demand of possession.*]—Two persons, each possessed of a lot of land, agree to exchange lots; that each shall have possession of the other's lot from a day named, and that they shall exchange good and sufficient deeds in one year from the date of the bond, and each gives the other a bond with a penalty conditioned to perform the conditions above. The year elapses without either giving a deed. Upon ejectment brought, for the lot which the plaintiff was to convey to defendant, *held*, that the demand of possession of the premises was necessary, and probably also that the plaintiff should offer, if not actually give up possession of the defendant's lot, which he (plaintiff) occupied under the agreement. *Perritt v. Arnold*, 413.

2. *Ejectment—Notice of intention to proceed—Necessary when four terms have passed without any steps having been taken.*]—*Held*, that one month's notice of intention to proceed is necessary in ejectment as well as in other actions, when four terms have passed without any proceedings having been taken. *The Bishop of Toronto v. Cantwell*, 371.

3. *Ejectment—Deed of bargain and sale—False demonstratio—Rejection of the incorrect portion—Description by reference to other deeds.*]—One S. B. by deed dated January, 1851, conveyed to W. T. 120 acres of the south part of lot 6 in the 2nd concession of Canborough, describing it by metes and bounds. In March,

1855, W. T. and wife conveyed to the defendant J. T. the southerly part of lot No. 2, in the 2nd concession of Canborough, "which said southerly part was sold by S.B. to W. S." The defendant J. T. and wife conveyed to T.H. the north 65 acres of the southerly part of No. 2, in the 2d concession of Canborough, described as follows: "which said southerly part was sold to Wm. Tice by Samuel Birdsall, and by the said Wm. Tice conveyed to J. T. by deed, &c." T.H. and wife conveyed to one M. in fee 65 acres of the southerly part of lot No. 6, in the 2nd concession of Canborough, by metes and bounds, and concluding, "the same being the lands originally sold by W.T. to J.T. and by J. T. to H." M. entered into possession and demised for one year to the plaintiff Dohn, who entered, and being disturbed by the defendants, brought this action to recover possession. It was admitted there was no lot No. 2 in the 2nd concession of Canborough. *Held*, the description of lot No. 2 being *falsa demonstratio*, and it appearing in evidence that Birdsall did convey the south part of lot No. 6, in the 2nd concession of Canborough, to Wm. T., and by rejecting the words "No. 2," sufficient remained to shew that 65 acres of No. 6 were conveyed, therefore the plaintiff was entitled to the *possession*. *Valentine Dohn v. Jacob Tice and James Tice*, 289.

4. *Ejectment—Usury—Effect of a decree in Chancery—How far evidence in a suit on a mortgage.*—Usury having been set up as a defence to an action of ejectment brought on an indenture of mortgage, the plaintiff gave in evidence a decree of the Court of Chancery between him and the defendant in a foreclosure suit on the same mort-

gage, which upheld the mortgage, and in effect declared that it was not tainted with usury. *Held*, that a decree of the Court of Chancery in a suit between the same parties upon the same identical question attempted to be raised in another suit, is conclusive. *Scripture v. Curtis*, 345.

5. *Ejectment—Consol. Stat. U.C. ch. 90, sec. 12—Vested remainder.*—Plaintiff claimed title by sheriff's deed of the lands in question, sold under an execution against one John Maloney, who was devisee of the said lands, subject to certain legacies under the will of John Maloney, deceased. For the defendant, it was urged that no proof having been given of John Maloney's performance of the conditions of the will that the estate never vested in him. Also, that the estate having been created before A. D., 1850, it could not be sold under execution. *Held*, that the conditions of the said will were conditions subsequent, and it was for the defendant to shew that the estate had been divested by non-fulfilment thereof. 2nd. That the estate was a *vested remainder*, and not such an estate as required the aid of ch. 90, Con. Stats. sec. 12, to allow of its being sold under an execution against the defendant. *Wm. Lundy v. John Maloney*, 143.

ENDORSEMENTS.

Chattel mortgage as security against.—See CHATTEL MORTGAGE.

ENDORSER.

See BILL OF EXCHANGE, 2.—PROMISSORY NOTE, 5.

ESTOPPEL.

See WAREHOUSE. — MORTGAGE, 2.

EQUITABLE PLEA.

See **SHERIFF.**

EQUITY.

Of redemption.]—See **MORTGAGE, 1.**

EVIDENCE.

See **AGREEMENT, 3—EJECTMENT, 4—WITNESS, 4.**

As to a by-law taking effect.]—See **LEASE, 2.**

Appeal—Witness—Competency of a party to suit when called by opposite party.]—*Held*, that a party to a suit called and examined as a witness at the instance of the opposite party, is rendered competent as a general witness, and that his incapacity by reason of interest is thereby wholly removed. See **Lamb v. Ward, 18 Q.B.U.C. 305**, where the contrary is decided. *Dickson, Defendant, (Appellant,) v. Pinch, Plaintiff, (Respondent), 146.*

EXECUTION.

Creditor.]—See **INTERPLEADER, 3.**

EXECUTOR.

Promissory note given as such—Personal liability thereon.]—See **PROMISSORY NOTE, 4.**

Bond given by.]—See **PROMISSORY NOTE, 7.**

EXTINGUISHMENT.

Of promissory note by giving a bond.]—See **PROMISSORY NOTE, 7.**

EVIDENCE.

See **SLANDER.—SURETY, 1.—TRESPASS, 1.**

FALSA DEMONSTRATIO.

See **EJECTMENT, 3.**

FALSE.

Return.]—See **SHERIFF.**
Representation by warehouseman.]—See **WAREHOUSE.**

FEEES.

Of registration]—See **REGISTRATION.**

FENCING.

See **RAILWAY, 3.**

FIERI FACIAS.

See **SHERIFF.**

FIXTURES.

Covenant to repair]—See **LEASE, 3.**
In mill.]—See **INTERPLEADER, 5.**

FORECLOSURE.

See **COVENANT, 1.—EJECTMENT, 4.—MORTGAGE, 3.**

FORFEITURE.

See **BY-LAW, 2.**

FORM.]

Of warrant of commitment.]—See **ASHBURNTON TREATY.**

Of interpleader issue.]—See **INTERPLEADER, 4.**

FRAUD.

See **PROMISSORY NOTE, 6.**

In issuing warehouse receipts.]—See **WAREHOUSE.**

FULFILMENT.

Of covenants.—See AGREEMENT.

FUNDS.

Of corporation.—See BY-LAW, 1.

GARNISHEE.

Garnishee—Judgment recovered—Attachment of smaller sum—How far satisfaction of greater—Pleading.—The plaintiff declared on a mortgage for £309. Plea thereto *non est factum*. Second count on a judgment in the Queen's Bench for £78 12s. 11d. Third count on a judgment in this court for £128 18s 5d. To both last counts the defendant pleaded on equitable grounds, that the judgments were obtained on confessions taken by plaintiff from defendant, while he (plaintiff) was his attorney, by fraud, covin and misrepresentation, and that they were given without consideration, and by undue influence, and after setting out two judgments amounting in all to £99 17s. 8d., recovered against the plaintiff, and attachments, and *fi. fa.* lands issued thereon against the defendant, and alleging said judgments to be in full force and unsatisfied, alleged that the indebtedness as in the first and second counts alleged (if any) due to the plaintiff have been attached to satisfy the other judgments. On demurrer held bad; 1st, because it was pleaded in bar of the plaintiff's whole cause of action on the second and third counts, whereas it only shewed a partial answer if good as to that. 2nd. That it did not shew any order requiring the garnishee to pay the judgment creditor. 3rd. That the proceeding taken upon the judgment did not amount to a satisfaction, because, for all that

appears on the pleas, the plaintiff in the attachment may issue execution and obtain satisfaction against the present plaintiff during the currency of the *fi. fa.* against lands. *Blevin v. Madden*, 195.

GATES.

Acceptance of on railway in lieu of fence.—See RAILWAY, 3.

GEARING.

Mill.—See INTERPLEADER, 5.

GOODS.

Sold.—See GUARANTEE.

Description of in chattel mortgage.—See CHATTEL MORTGAGE.

Promissory note given for by, executor.—See PROMISSORY NOTE, 4.

Goods sold—Judgment recovered for part, not necessarily a bar to a subsequent action for remainder—Nonsuit.—Where a party to a suit allows a verdict to be taken against him by suggestion of the judge without insisting that the case should go to a jury upon points whereon it was the jury's province to decide, he cannot afterwards on a motion for a new trial take exception to it for misdirection. A plaintiff having failed upon a trial for a portion of his claim (goods sold) on the ground that the term of credit had not expired when he commenced his action. *Held*, that the judgment recovered in the suit was not a bar to a subsequent action for the same goods and that the plaintiff was not bound to take a nonsuit in his first action to entitle him to recover in the second. *Chisholm et al. v. Morse*, 589.

GRANTOR.

In mortgage estopped from denying debt.]—See **MORTGAGE**, 2.

GROUND.

For moving mandamus.]—See **MANDAMUS**.

GUARANTY.

See SURETY, 3.

Goods sold—Guaranty—Action against guarantor.]—The defendant purchased goods from the plaintiffs with instructions to charge and send them to one Fox, which they did, and after receiving a portion of the purchase money brought this action against the defendant, claiming that he was liable as purchaser of the goods. Several letters were put in evidence written by the plaintiff to Fox, in one of which was the following passage: "It is now so long since your account was due, that there is no other recourse left except to follow up Mr. McLeod, who is guarantor," and in another, "We shall place the matter in the hands of Gordon Leggatt, Esq., Amherstburg, with instructions to proceed immediately against you and Mr. McLeod for the amount." The plaintiff also proved that the defendant had ordered goods in the same manner from merchants in Montreal, and some instances paid, and in others given his own notes for them. The jury having found for the plaintiffs the court refused to disturb the verdict. *Ogilvie et al. v. McLeod*, 348.

HABEAS CORPUS.

See ASHBURTON TREASTY.

HUSBAND.

See SLANDER.

IMMEDIATE EXECUTION.

Immediate execution—County courts—Power of judge of to certify for—23 Vic., ch. 42, sec. 4.]—*Held*, that in a case pending in one of the superior courts, and taking down for trial to county court under 23 Vic., ch. 42, sec. 4, the judge of the court below has power to order immediate execution to issue. *Gildersleeve v. Hamilton*, 298.

IMPROVEMENTS.

By combination, right to claim as patentee.]—See **PATENT**, 2.

INCHOATE.

Purchase of land]—See **LEASE**, 5.

INDICTMENT.

See RAILWAY, 1, 5.

INFRINGEMENT.

Of by-law.]—See **BY-LAW**, 2.

Of patent.]—See **PATENT**, 1.

INJUNCTION.

Unconditional.]—See **MORTGAGE**, 1.

INJURY.

To reversion by non-repair of premises.]—See **LEASE**, 4.

INSOLVENCY.

Of assignee of stock.]—See **RAILWAY**, 4.

INSTALMENT.

Of purchase money.—See AGREEMENT, 2.

INSURANCE.

Insurance policy—Change of risk without notice,—Policy vitiated thereby—Conditions.—The premises covered by a policy of insurance were, when insured, used as a store, and were after insurance used as a printing office, without notice to the company or the settlement and payment of any additional premium for the increased risk, contrary to a condition endorsed thereon. *Held*, that the policy was vitiated. *Hervey et al., Assignees of Alfred Hooker, v. The Mutual Fire Insurance Company of Prescott*, 394.

INTEREST.

See PROMISSORY NOTE, 1.

INTERPLEADER.

1. *Interpleader—Married woman—Judgment recovered against by her maiden name not absolutely null and void.*—A. having obtained possession of certain goods and chattels by bill of sale from a sheriff upon an execution issued on a judgment recovered against a married woman without joining her husband. B. having recovered a judgment and issued an execution in the same way (without joining the husband) contended in an interpleader that A.'s judgment was null and void, and that he was entitled to the goods. *Held*, that A.'s judgment not being absolutely null and void, and he being in possession with a *prima facie* title, he was entitled to raise the same objection to B.'s judgment, and that both judgments being open to the same objections,

he was entitled to prevail. *Davis v. Levey et al.*, 292.

2. *Interpleader—Verdict on default—Motion to set aside—Affidavit of merits.*—A verdict having been taken in an interpleader suit in the absence of the defendant upon a clear *prima facie* case, the defendant, upon a motion for a new trial, swore that he had not information of the trial coming on in time to be at the assizes, and his attorney swore that from information obtained from the plaintiff's brother, he verily believed the defendant had a good defence on the merits. *Held*, not to be sufficient without shewing facts upon which his belief is founded, and sufficient cause for his absence from the trial not being shewn, a new trial was refused. *Proudfoot v. Harley*, 389.

3. *Interpleader issue—Con. Stat. U. C., ch. 30, sec. 8.*—In an interpleader issue, under ch. 30, sec. 8, Consol. Stat. U. C., to try title of claimants of goods as against the execution creditor, *held*, that the form of the issue assumes the right of the execution creditor to seize the goods of the execution debtor by virtue of a judgment recovered against the debtor, and consequently the execution creditor is not bound to shew that he has recovered a judgment. *Holden and Adamson v. Langley, Patterson v. Langley*, 407 & 411.

4. *Interpleader—Form of issue—Question whether at the time of seizure or delivery of the writ to the sheriff.*—A sheriff under a writ of execution in a suit A. v. B. seizes certain goods. C. having claimed the goods, an interpleader order was applied for and obtained, which directed an issue to try whether the goods seized were at the time of the delivery of the writ to the sheriff

the property of B. This order was subsequently amended by altering the issue to try whose property the goods were at the time of the seizure by the sheriff. An application was made at the trial by the defendants to have it postponed on the ground that the amendment was prejudicial to them, which was granted on payment of costs, the conditions not being complied with the cause proceeded and a verdict was taken for the plaintiffs. On motion for a new trial, *held*; that the proper issue in an interpleader case is to try whether the goods at the time of the seizure, not at the time of the delivery or the writ to the sheriff, were the goods of the claimant. *Van Every et al. v. Ross et al.*, 133.

5. *Interpleader—Mill—Gearing and fixtures—Right of property therein.*—One I. being the tenant of premises under the plaintiff consisting of a mill, &c., upon the same being burned down, refits the machinery, putting in some of the old and some new portions, the sheriff seizes under an execution against the tenant and levies and removes some portion of the gearing. It was not shewn whether the tenant's term had expired at the time of the seizure or not, nor whether he was under a covenant to repair and keep in repair or not. Upon an interpleader to try the title to the property seized by the sheriff, *held*, that the facts were not sufficiently stated to enable the court to come to a decision, but that the *prima facie* case appeared in favor of the plaintiff as landlord of the premises. *Donkin v. Crombie*, 601.

INVENTION.

See PATENT.

ISSUE.

Form of interpleader.—See INTERPLEADER, 4.

Birth of issue.—See WILL.

JOINDER.

See BOND, 2:

JOINT.

And several bond.—See BOND.

JOINT-STOCK COMPANY.

Joint-stock company—Provisional directors—Personal liability—Relieving of by properly constituted authority.—Certain persons, seven in number, the defendant being one were by statute incorporated as a body politic, under the name of the Amherstburg and St. Thomas Railway Company, with certain powers, among other things to obtain a certain amount of stock, which amount, as soon as it was obtained, a meeting of the general stockholders was to be called to organize the company. These seven acting as provisional directors, passed a resolution authorising one R. M. to retain counsel to prosecute a certain suit in Chancery on their behalf, and on the same day the board of directors which had been previously chosen by the stockholders, passed a resolution to the same effect. The plaintiffs were thereupon retained, and proceedings in Chancery instituted, for the costs of which this action was brought. *Held*, that the passing of the resolution being an illegal act on the part of those who did it, and the responsibility arising therefrom not being removed by the resolution of the general board of direction, the defendant

as well as the others who authorised the retaining of the plaintiff, was liable therefor personally. *George Macbeth, Defendant, (Appellant,) v. McDonald et al., Plaintiffs, (Respondents),* 224.

JOINT TENANTS.

See CHATTEL.

JUDGMENT.

See ATTACHMENT.—BILL OF EXCHANGE, 4.—GARNISHEE.—INTERPLEADER, 3.

Creditor.]—See GARNISHEE.

Against a married woman by her maiden name,]—See INTERPLEADER, 1.

Roll—Amendment of.]—See PRACTICE.

Recovered for part of goods sold.]—See GOODS.

By default on bond.]—See SURETY, 2.

JUS TERTII.

See TRESPASS, 3.

LAND.

See BOND, 3.—DIVISION COURT.

Agreement for the purchase of.]—See AGREEMENT, 1, 2, 3.

Bond conditioned for exchange of.]—See EJECTMENT, 1.

Inchoate, purchase of.]—See LEASE, 5.

Land—Purchase of by lottery—Action for balance of purchase money—Stat. 12 Geo. II.]—Declaration for £100, agreed to be paid by defendant to plaintiff for his right to a certain lot of land. Plea, that one

J. sold by way of lottery, contrary to the statute, to one V., whose right with full knowledge of the lottery plaintiff purchased and sold to the defendant with J.'s consent, who conveyed the premises to the defendant. On demurrer, held, that the plea was good as shewing a contract void under the stat. 12 Geo. II., and that the action is not maintainable. *Loyd v. Clark*, 248.

LANDLORD.

See TENANT.

LATCHES.

See SCHOOL, 2.

LEASE.

See ARBITRATION, 2.

1. Lease—Covenant for quiet enjoyment—Breach of under superior authority not existing at execution of lease—How far lessor liable for.]—By letters patent, bearing date in the year 1840, certain lands situate on the water's edge in the city of Toronto, were granted to one "A."; the patent containing a condition for the erection of an esplanade according to a certain plan, within three years from date thereof. A., by indenture, demised the said lands to plaintiff, with full covenants against all the world. In 1853, the stat. 16 Vic., ch. 219, enacted, that unless the owners and lessees should, within twelve months, erect the esplanade, the corporation of the city of Toronto should do it, and impose a special rate to defray the expense thereof; and by stat. 20 Vic., ch. 80, further powers were granted to the corporation with respect to the erection of the esplanade, among others to enter upon

the water lots, &c. Under the above mentioned statutes the corporation by their agents, entered upon the premises in question, and by filling up the space between the water's edge and the esplanade, prevented the working of the plaintiff's mill, which was the damage complained of in this suit. *Held*, that the act of the corporation being done under superior authority (the legislature) although the statute did not exist at the time of the execution of the lease, yet as the breach of covenant did not arise from the neglect, fraud or procurement of the lessor, but from the nonfulfilment by the lessee of his own covenants, the defendants were entitled to succeed. *Snarr v. Baldwin, et al.*, 353.

2. *Held*—1st. That an ordinary lease containing the words "and to pay taxes," covers a special rate created by a corporation by-law as well as all other taxes. 2nd. A by-law should state a day on its face when it shall take effect, and should not require extrinsic evidence to be looked for to ascertain that fact. 3rd. The Municipal Institutions Act authorises the clerk of the council to "examine and finally determine" whether petitions are in conformity with the provisions of that act, and a certificate being given by the clerk, the court has no power, except in a case of fraud or *mala fides*, to interfere. *In the matter of George Michie and the Corporation of the City of Toronto*, 376.

3. *Lease—Covenant to repair—Buildings not fixed to freehold—How far application to.*—In an indenture of lease, D. covenanted with A. at all times during the term, to repair, support, amend, and keep the demised premises, with all necessary reparations and amendments whatsoever, and the said

premises so repaired, with the appurtenances, and all things which at the time of the execution of the said indenture were, or at any time during the term, should be fixed or fastened to or set up in or upon the premises, at the expiration of the term peaceably to yield up to A., with all and singular the fixtures thereto belonging, in as good condition as the same were at the execution of the indenture, reasonable use excepted. *Held*, that the covenant entered into by D., extended to a building resting on blocks of wood, not let into the ground, also to a building resting on stumps, and also to a building laid upon scantling and old posts, not let into the ground, all placed on the demised premises during the term. *Allardice v. Disten*, 278.

4. *Lease—Reversioner—Measure of damages to—How far length of lease to be considered.*—In an action on a lease (having many years to run) for rent and non-repair of the premises, *held*, that the reversioner by reason of the length of lease is not restricted to nominal damages, but the measure of damages is the amount to which the reversion is injured by the premises being out of repair. *Atkinson v. Beard*, 245.

5. *Lease—Inchoate purchase of land—Possession—Crops.*—S. A., before marriage to C. R., her present husband, (on the 1st of April, 1857,) leased certain lands to the defendant by the year, one-third of the yearly crop to be paid as rental. To a declaration claiming the non-delivery of the crop as agreed, defendant pleaded, thirdly, that on 17th April, 1860, the lands in question were sold under Chancery sale to one D., who paid his deposit and signed a memorandum, and thereby became entitled and entered into possession, and took and converted

one-third of the crop to his own use, whereby he, defendant, was prevented from furnishing the same. *Held*, that D. being only an inchoate purchaser, he was not entitled to the crops, and therefore that defendant was liable on his contract. *Cavie Richardson and Sarah Ann his wife v. Richard Trinder*, 130.

6. *Lease—Reservation in—Construction of—Pleading.*—The plaintiff occupied certain premises on the bank of the river Niagara near the falls. The defendant occupied by an assignment of a lease from the Crown, premises of the same nature nearer the falls, in which lease was a condition that free access be permitted to the falls by the staircase and pathway at the foot of the rock on the defendant's premises, at all times to all persons on payment of a sum not to exceed 25 cents. "Mr. Thomas Barnett or any assignee of the premises now occupied by him at the falls, or regularly employed guide or guides in his service, while conducting any person or persons to, under, or from the sheet of water to be exempted from all charge for the use of the said pathway." The defendant erected a fence across the pathway at the most northern limit of his land below the bank, and thereby shut off the plaintiff's access to the falls by means of his (plaintiff's) staircase, which was further from the falls, for which obstruction the plaintiff brought this action, claiming in his declaration a wrongful obstruction of the said staircase and pathway. The defendant pleaded that he did not obstruct the staircase and pathway reserved for the use of the plaintiff by the letters patent. *Held*, that the only right claimed in the declaration being that granted by the letters patent, which, on the pleadings, was shewn

not to have been obstructed, the defendant was entitled to recover. *Barnett v. Caplin*, 76.

7. *Mill—Lease—Right of lessee to the use of the stream—Pleading—Consol. Stat. U.C., ch. 47—Obstruction of race way.*—The plaintiff declared as the possessor of premises near to the river Otonabee, and claimed by reason thereof the use and privileges of that stream for working his mill, &c., that the defendant, by throwing slabs and waste stuff from his mill into the stream obstructed the flow of the stream, and thereby caused injury to the plaintiff. It appeared from evidence at the trial that one R. was owner of the mill occupied and used by plaintiff, and of the land and premises between the mill and the river, also of the land enclosing the pond, and that the plaintiff was his lessee. Evidence was also given to shew that the defendant (with others) was the cause of the obstructions complained of. The defendant objected that the plaintiff not being the owner of the land adjoining the river, and the mill not being on the river, could not claim damages for any obstruction thereto. *Held*, that a *prima facie* right proved by the plaintiff was sufficient to entitle him to recover damages from a wrong-doer who shewed no right or title in himself, and secondly, that an assignment from R., who was the owner of the land and mill, also of the pond, carried with it the privileges and appurtenances thereto belonging, and the plaintiff as tenant of the premises was thereby entitled to recover against any wrong-doer. Thirdly, that the form of declaration as stated was sufficient, and that there was no variance in the evidence which would bar the plaintiff's recovery. *Austin v. Dickson and Austin v. Shaw*, 594.

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1. *Mortgage—Equitable plea of satisfaction—Unconditional injunction.*]—Declaration for an instalment of principal and interest due by defendant to plaintiff on a mortgage. Plea on equitable grounds, that at the time of executing the instrument declared on there was a prior mortgage on the property, which, before the commencement of this action, had been foreclosed; that the mortgagee in this prior mortgage had agreed to and had conveyed to an appointee the estate in the lands upon condition that the surplus value thereof over and above the first mortgage should go towards satisfaction of defendant's mortgage; and that the surplus value thereof was the full amount of the principal and interest of the defendant's mortgage, and thereby in equity the defendant was relieved

from his covenants. On demurrer held, that the facts as stated shewed an outstanding equity of redemption in the defendant, and that before justice could be done a release would have to be executed by him, which this court had no power to compel, and therefore the plea was not a good defence. *Brown v. Osborne*, 500.

2. *Debt—Mortgage—Execution of as security—Not open to grantor to deny indebtedness—Estoppel.*]—Defendant being indebted to plaintiff for a sum of money; by an indenture reciting his indebtedness, and that he had agreed with plaintiff for the re-payment of the said sum due within 6 months from date with interest, conveyed to plaintiff certain lands *habendum* in fee. Proviso, that plaintiff, if debt was duly paid would re-convey, but there was no covenant in the indenture for re-payment by defendant; endorsed on the indenture was a deed poll executed by plaintiff stating the said debt thereby secured to be the proper money of one J. L., and that the plaintiff's name was only introduced therein as agent for the said J. L., and in consideration of the trust, and of 5s., absolutely assigned all interest in the lands in the said indenture as well as the indenture to the said J. L. On motion to set aside nonsuit, held that it was not open to defendant to deny that he was at the date of the said indenture indebted to the said plaintiff. *Allnutt v. Ryland*. 300.

3. *Mortgage—Foreclosure—Costs of—How far recoverable as damages against the assignor when not allowed in Chancery.*]—Upon a foreclosure suit in Chancery upon a mortgage for £350, upon which only £250 had been in fact advanced, the court disallowed the additional £100, and the costs of the suit. The plaintiff

(being the assignee of the mortgage) then claimed to recover these costs from the defendant, his assignor, upon his covenant for the validity of the security, &c. *Held* not recoverable. *Sturges v. Bitner*, 102.

MOTHER.

Survival of right of action for seduction.]—See SEDUCTION.

MUNICIPAL.

Corporation.]—See BOND.
Institutions act.]—See LEASE, 2.
—TRESPASS, 2.

MURDER.

See ASHBURTON TREATY.—PROCLAMATION.

MUTUALITY.

In covenant.]—See AGREEMENT, 1.

NEGLIGENCE.

See ATTORNEY, 2.

NONSUIT.

See SLANDER.—GOODS.

NOTICE.

Of proceeding in ejectment.]—See EJECTMENT, 2.

Of change of risk in insurance.]—See INSURANCE.

Of action against magistrate.]—See MAGISTRATE.

Of endorser of promissory note being surety for the maker.]—See PROMISSORY NOTE, 3.

Of dishonour.]—See EJECTMENT, 4.

Of action against school trustees.]—See SCHOOL, 1.

NULLA BONA.

Return of from counties through which a railway passes.]—See RAILWAY, 2.

NUMBERING.

Of lots.]—See SURVEY.

NUNQUAM INDEBITATUS.

Plea of on award.]—See ARBITRATION, 2.

OBSTRUCTION.

Of raceway.]—See LEASE, 7.

ORDER.

See GARNISHEE.
Of reference.]—See ARBITRATION, 1.

PARTNER.

Responsibility of for fraud of co-partner.]—See PROMISSORY NOTE, 6.

PARTNERSHIP.

See BILL OF EXCHANGE, 3.
Between attorney and client.]—See ATTORNEY.

Fraud of one of co-partners.]—See PROMISSORY NOTE, 6.

Right of to recover debt contracted to an individual member of the firm.]—See SURETY, 3.

PARTY.

To suit, competency of as witness.]—See EVIDENCE.—WITNESS.

PREPARING.

Deed.]—See BOND, 3.

PRINCIPAL

Principal — Agent — Statute of Frauds—Contract—Delivery—Payment.]—A. having verbally contracted with B., the agent of a undisclosed principal for the sale to and purchase by B. of certain goods &c., amounting in value to the sum of \$100 and more, but before any delivery or part payment, the name of the principal having been disclosed by B., *held*, that the contract was not binding before a part delivered or payment took place, and as neither took place before the disclosure by B. of his principal, he was not personally liable. *Haight v. Howard*, 437.

PRIVITY.

See WAREHOUSE.

PROCLAMATION.

Proclamation—Reward—Conviction—When necessary that it should take place before reward payable.]—Declaration for reward of \$800 offered by the defendants to any person giving such information as would lead to the conviction of the murderer or murderers of certain persons therein named. The defendant pleaded that the plaintiff did not give such information, &c., and that the said murderer was not convicted, it appearing that the accused while waiting his trial, committed suicide in gaol. Upon demurrer, *held*, that the actual conviction of the party accused was a condition precedent to the recovery of the reward, and that the committing of suicide by the accused did not

entitle the plaintiff to a verdict. *Fortier v. Wilson et. al.*, 495.

PROMISSORY NOTE.

Promissory note—Interest recoverable at the rate drawn after maturity till payment.]—*Held*, that interest is recoverable on a promissory note at the same rate for which it is drawn over six per cent. till payment. *Howland v. Jennings*, 272.

2. *Promissory note—Payable in Lower Canada, and payee and drawer residents of Upper Canada—Lex loci—Lex fori—Statute of Canada, 12 Vic., ch. 22.*]—A person resident in Upper Canada being in Lower Canada, makes two promissory notes, each payable at a place certain in Lower Canada, several months after date, to another person also resident in Upper Canada, who at the time carried on business as a forwarder in Lower Canada. While the notes were still held by the payee, and after they were due, and more than five years before the commencement of the suit, the defendant and payee met together in Lower Canada, so that the payee might have brought an action against the defendant; the notes were after this endorsed to the plaintiffs, neither of whom were resident in Lower Canada; the notes fell due in July and December, 1854, and this action was commenced in September, 1860. *Held*, that the parties being residents in Upper Canada when the notes were made, when they became due, and when they were dishonored, the statute of Canada, 12 Vic., ch. 22, sec. 31, did not bar the plaintiffs' recovery, and that that statute applies to the remedy and not to the contract itself. *Richards, J., dissentiente. Hervey et al. v. Fridham*, 329.

3. *Promissory note—Maker of, surety for the endorser—Notice of after becoming the holder—Release of surety thereby.*]—Declaration on a promissory note made by defendant, endorsed by one O. T. M. to plaintiffs. Plea, on equitable grounds, that the defendant was surety for O. T. M., and made the note for his benefit without value, of which the plaintiffs became aware after they became the holders thereof, and after notice thereof gave time to O. T. M., and thereby released defendant. On demurrer, *held, bad.* *The Bank of Upper Canada v. Thomas*, 515.

4. *Promissory note—Executors—Given as such in carrying on business—Personal liability thereon.*]—The defendants, as executors, purchased goods of the plaintiffs, and gave notes in the following form therefor. "—months after date. we, as executrix and executors of the late Benjamin Parsons, promise to pay Messrs. Kerr, Brown & Co., or order, at their office in Hamilton, \$—value received. (Signed,) Mary Parsons, James P. Stonehouse, George H. Parsons, executrix and executors of B. Parsons, deceased." *Held*, that that the defendants were personally responsible thereon. *Kerr et al. v. Parsons, et al.*, 513.

5. *Promissory note—Notice of dishonor—Action by original holder against endorser—How far an answer in another action by another endorser and holder against a prior endorser.*]—Declaration on a promissory note, made by A. payable to B., (defendant,) endorsed by him to C., who endorsed to D., who endorsed to plaintiff, and on the common counts. Plea, that said note before it became payable was endorsed by plaintiff to one J. H. C. who endorsed it to S. B. H., who en-

dorsed it to the Commercial Bank, who were the holders when it matured, and until the recovery by defendant of a judgment upon an action brought by the said Commercial Bank, and that the notice of dishonor alleged to have been given by plaintiff to defendant is an alleged notice said to have been given by Commercial Bank to defendants in their suit, and no other notice; and that defendant in the suit between the Commercial Bank and himself recovered a judgment against the Commercial Bank, and that the plaintiff had notice of the action between the Commercial Bank and defendant, before he became the holder of the note. On demurrer, *held, bad*, the action between the Commercial Bank, the original holder, and the defendant being no answer to an action by any other party on the note who was a subsequent holder to the defendant. *Smith v. Burton*, 273.

6. *Promissory note—Brokers—Responsibility of one partner for the fraud of his co-partner committed on securities intrusted to co-partnership after the dissolution thereof.*]—Plaintiff gave defendants, who were co-partners and brokers, two promissory notes, payable to their order to get discounted, and pay the proceeds to him, or to return the notes should they not be discounted. He afterwards drew upon the defendants for £200 on account of the notes. The defendants did not discount the notes while in partnership, but after the dissolution thereof defendant, in fraud of his co-partner, endorsed the partnership name on the notes, and passed them away, and applied the proceeds to his own personal use. *Held*, that the defendants were jointly liable, and that the draft for £200 did not annul the original

mortgage for a simple contract debt of a larger amount than that secured and covenanted to be paid by the mortgage, is a satisfaction of the simple contract debt for the larger amount. *Allen v. Alexander*, 541.

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1. *Mortgage—Equitable plea of satisfaction—Unconditional injunction.*—Declaration for an instalment of principal and interest due by defendant to plaintiff on a mortgage. Plea on equitable grounds, that at the time of executing the instrument declared on there was a prior mortgage on the property, which, before the commencement of this action, had been foreclosed; that the mortgagee in this prior mortgage had agreed to and had conveyed to an appointee the estate in the lands upon condition that the surplus value thereof over and above the first mortgage should go towards satisfaction of defendant's mortgage; and that the surplus value thereof was the full amount of the principal and interest of the defendant's mortgage, and thereby in equity the defendant was relieved

from his covenants. On demurrer held, that the facts as stated shewed an outstanding equity of redemption in the defendant, and that before justice could be done a release would have to be executed by him, which this court had no power to compel, and therefore the plea was not a good defence. *Brown v. Osborne*, 500.

2. *Debt—Mortgage—Execution of as security—Not open to grantor to deny indebtedness—Estoppel*—Defendant being indebted to plaintiff for a sum of money; by an indenture reciting his indebtedness, and that he had agreed with plaintiff for the re-payment of the said sum due within 6 months from date with interest, conveyed to plaintiff certain lands *habendum* in fee. Proviso, that plaintiff, if debt was duly paid would re-convey, but there was no covenant in the indenture for re-payment by defendant; endorsed on the indenture was a deed poll executed by plaintiff stating the said debt thereby secured to be the proper money of one J. L., and that the plaintiff's name was only introduced therein as agent for the said J. L., and in consideration of the trust, and of 5s., absolutely assigned all interest in the lands in the said indenture as well as the indenture to the said J. L. On motion to set aside nonsuit, held that it was not open to defendant to deny that he was at the date of the said indenture indebted to the said plaintiff. *Alnutt v. Ryland*. 300.

3. *Mortgage—Foreclosure—Costs of—How far recoverable as damages against the assignor when not allowed in Chancery.*—Upon a foreclosure suit in Chancery upon a mortgage for £350, upon which only £250 had been in fact advanced, the court disallowed the additional £100, and the costs of the suit. The plaintiff

(being the assignee of the mortgage) then claimed to recover these costs from the defendant, his assignor, upon his covenant for the validity of the security, &c. *Held* not recoverable. *Sturges v. Bitner*, 102.

MOTHER.

Survival of right of action for seduction.]—See SEDUCTION.

MUNICIPAL.

Corporation.]—See BOND.
Institutions act.]—See LEASE, 2.
—TRESPASS, 2.

MURDER.

See ASHBURTON TREATY.—PROCLAMATION.

MUTUALITY.

In covenant.]—See AGREEMENT, 1.

NEGLIGENCE.

See ATTORNEY, 2.

NONSUIT.

See SLANDER.—GOODS.

NOTICE.

Of proceeding in ejectment.]—See EJECTMENT, 2.

Of change of risk in insurance.]—See INSURANCE.

Of action against magistrate.]—See MAGISTRATE.

Of endorser of promissory note being surety for the maker.]—See PROMISSORY NOTE, 3.

Of dishonour.]—See EJECTMENT, 4.

Of action against school trustees.]—See SCHOOL, 1.

NULLA BONA.

Return of from counties through which a railway passes.]—See RAILWAY, 2.

NUMBERING.

Of lots.]—See SURVEY.

NUNQUAM INDEBITATUS.

Plea of on award.]—See ARBITRATION, 2.

OBSTRUCTION.

Of racway.]—See LEASE, 7.

ORDER.

See GARNISHEE.

Of reference.]—See ARBITRATION, 1.

PARTNER.

Responsibility of for fraud of co-partner.]—See PROMISSORY NOTE, 6.

PARTNERSHIP.

See BILL OF EXCHANGE, 3.

Between attorney and client.]—See ATTORNEY.

Fraud of one of co-partners.]—See PROMISSORY NOTE, 6.

Right of to recover debt contracted to an individual member of the firm.]—See SURETY, 3.

PARTY.

To suit, competency of as witness.]—See EVIDENCE.—WITNESS.

made for the stock sued for to entitle the plaintiff to recover. *Jenkins et al. v. Wilcocks*, 505.

3. *Railway crossing — Fencing — Private easement — Acceptance of gates in lieu of fence.*—Declaration against defendants for neglecting to erect and maintain sufficient fences upon the line of their railway, whereby plaintiffs horses and colts strayed on the railway track and were killed, &c. *Plea*, that the railway was constructed on the plaintiff's farm on a level, and gateways put in the fence for his convenience, which it was his duty to keep closed and fastened, but that he allowed them to get open and out of repair, by means whereof, &c. On demurrer, *held*, that the acceptance and use of gates by the plaintiff was a waiver of the duty imposed upon the defendants to fence their line or road, and that having once accepted the fence in that state it was not the defendants' duty to use extraordinary means to prevent accidents. *Held* also, that an agreement to accept and see to gates on the plaintiff's farm, in place of fences, is not an agreement in relation to land coming within the Statute of frauds. *The Great Western Railway Company, Defendants, (Appellants,) and Vilaire, Plaintiff, (Respondent,)* 509.

4. *Railway company — Calls — Mode of making — Invalid when more than one made upon same day — Assignment — Valid when first call thus made has been paid — Insolvency of assignee.*—The calls upon stock in a railway company cannot be made at less intervals than two months. Where the directors of a company at one meeting made several calls, payable at intervals of two months from each other, *held*, that a stockholder who has paid

the first call thus made, and then assigned his shares, was not responsible for the subsequent calls thus illegally made. *Held*, also, that the insolvency of the assignee of the stock was no ground for vitiating the assignment; the only condition precedent for the valid assignment of stock being the payment of all calls. *Moore et al. v. McLaren*, 534.

5. *Railway — Crossing — Duty of company — Indictment of locomotive driver for manslaughter — How far an answer to an action for damages — Administrator.*—*Held*, that the fulfilment of the requirements of the statute (Con. Stat. of Canada, ch. 66, secs. 103, 104) by the railway company as to the ringing the bell or sounding the whistle at or approaching crossings does not of itself free the company from the responsibility of accidents or damage arising from any neglect or breach of duty by which any damage may arise. 2nd. That the acquittal of the locomotive driver on a train, upon a charge of manslaughter for the death of the party on account of whose death the action for damages was brought by his administratrix, did not constitute any answer to the action. *Ham (Administratrix) v. The Grand Trunk Railway Company*, 86.

RECEIPT.

Issued by warehouseman.—See **WAREHOUSE.**

REFERENCE.

See **ARBITRATION**, 1.

To deeds to correct error.—See **EJECTMENT**, 3.

RE-FILING.

Chattel mortgage.]—See CHATTEL MORTGAGE, 4.

REGISTRAR.

Fees of.]—See REGISTRATION.

REGISTRATION.

Of assignment.]—See ASSIGNMENT.

Of chattel mortgage.]—See CHATTEL MORTGAGE, 2.

Of ship.]—See SHIP.

Registration — Fees of, when documents to be recorded in more than one township.—How chargeable.]—*Held*, that the registrar is only entitled to charge for one registry of any document to be recorded in one or more townships, provided the number of words recorded, "counting folios," does not exceed 800, and all in excess of 800 words are to be charged per folio as allowed by the Statute Con.Stat. U.C., ch. 89, sec. 33, namely 13½ cents per folio. *In re George Lount, Registrar*, 97.

REJECTION.

Of incorrect portions in deed.]—See EJECTMENT, 3.

RELEASE.

See PROMISSORY NOTE, 8.

Of drawer.]—See BILL OF EXCHANGE, 3.

Power of court to compel execution of.]—See MORTGAGE, 1.

Of maker of promissory note by giving time to endorser.]—See PROMISSORY NOTE, 3.

REMAINDER.

Vested.]—See EJECTMENT, 5.

REPAIR.

Covenant to.]—See LEASE, 3.

REPLEVIN.

1. *Replevin—Lien—Tender—Accord and satisfaction—When the property in a chattel passes on an agreement for a sale.*]—A, having taken a likeness for B., agrees to take in payment therefor \$20 in cash and a cognovit for \$70, payable at a future date. After receipt of the \$20 and tender of the cognovit, and refusal of defendants to deliver the picture, the plaintiff brings replevin. *Held*, that the agreement for payment as above was a waiver of the right to lien, but did not amount to an accord and satisfaction. *Dempsey v. Carson*, 462.

2. *Replevin—Taxes—Distress for—Legal as to part.*]—A collector having legal authority (the tax roll) for the collection of three sums being the rates for three specific years due for taxes, distrains by his bailiff for the amount of them with other sums not properly collectable. Upon replevin, *held*, that the three legal distresses were separable from the illegal ones, and until the sums due on them were paid replevin would not lie, and that the defendant were entitled to the *possession*. *Held*, also, that a collector is responsible for the acts of his bailiff holding legal authority (by warrant) from him so to act, and that an action will lie against them jointly. *Corbett v. Johnston et al.*, 317.

3. *Replevin—Tender—Lien.*]—One C., being indebted to the defendant, assigns to him with plaintiff's consent his lien on a buggy

owned by plaintiff, on which he C. had a claim for repairs amounting to \$25 2/3c. The plaintiff subsequently demanded the buggy, but without any tender or offer to pay the lien. Upon replevin, *held*, that the defendant was entitled to succeed, there being no evidence of a tender or satisfaction of the lien. *Luke (Appellant) v. Biggar (Respondent)*, 170.

PRESERVATION.

In lease.]—See LEASE, 1, 6.

Of rights against sureties in an assignment.]—See BILL OF EXCHANGE, 5.

RESPONSIBILITY.

Of directors of a joint stock company.]—See JOINT STOCK COMPANY.

REVERSIONER.

Action by for non-repair of premises.]—See LEASE, 4.

REVISION.

Of costs.]—See PRACTICE.

REWARD.

See PROCLAMATION.

RISK.

Change of under insurance.]—See INSURANCE.

SALE.

Of land.]—See AGREEMENT, 1, 2, 3.

Of ship.]—See SHIP.

SATISFACTION.

See BILL OF EXCHANGE, 4.—GAR-
NISHEE.

Of simple contract debt by acceptance of higher security.—See MER-
GER.

Plea of.]—See MORTGAGE, 1.

Of lien.]—See REPLEVIN, 3.

SCHOOL.

1. *Trustees—Warrant—Distress—Trespass—Notice of action—Limitation of time for bringing—Collector—Statute 16 Vic., ch. 180.*]—*Held*, in deference to former decisions of this court, that a school trustee who is sued for any act done in his corporate capacity is entitled to notice of action, and that the action must be brought within six months. And that a school trustee acting in the discharge of his duty as such, is entitled to the protection of, and comes within, the statute 16 Vic., ch. 180, notwithstanding he should have signed a warrant individually instead of in his corporate capacity. *Held*, also, that a collector who committed a trespass while acting under a warrant issued by a competent authority was entitled to notice of action, and that the action should be brought within six months. *Spry v. Mumby et al.*, 285.

2. *School section—By-law—Quashing of—13 & 14 Vic., ch. 48.*]—On a motion to quash a by-law passed on the 1st of October, 1859, by defendants, doing away with school section No. 7, in the township of Darlington, and attaching a portion thereof to school section No. 6, and other part to No. 8. *Held*, 1st, that it is unnecessary that a by-law should state on its face that the alteration shall not go into effect till the 25th December following the

passing thereof—13 & 14 Vic., ch. 48, sec. 18, sub-sec. 4. 2nd, that no step having been taken to quash a by-law for a year and more from the passing thereof, the decision in *Hill v. Municipality of Tecumseth*, 6 C. P. 207, adhered to, and the motion was refused on account of delay in making the application. *Cotter v. Municipality of Darlington*, 265.

SEDUCTION.

Seduction—Action commenced by father during life time—Survival of to mother—Pleading.]—The plaintiff sued for the seduction of her daughter, claiming the right to continue the action upon a writ issued by the father, in his life-time, and declared for loss of service as between mistress and servant. The seduction, it was proved, took place and a child was born while the daughter resided with her parents, and during her father's life-time. *Held*, 1st. That the right of action did not survive to the mother. 2nd. That it was necessary (the case not coming within our statute) to allege and prove the relation of master and servant, and the loss of service occasioned thereby. *Healey v. Crummer*, 527.

SEIZURE.

Form of issue in interpleader.]—*See INTERPLEADER*, 4.

SEPARATION.

Of counties.]—*See BOND*, 1.

Of legal from illegal distress for taxes.]—*See REPLEVIN*, 2.

SETTING DOWN.

Appeal books.]—*See BAIL*.

SHERIFF.

Form of interpleader issue.]—*See INTERPLEADER*, 4.

Sheriff—Fi. fa. lands—False return.]—A sheriff having made a return to a writ of *fierifacias* lands, "lands on hand for want of buyers" and having subsequently, under a writ of *venditioni exponas* in the same suit, sold the lands under a binding contract, on which writ of *venditioni exponas* he made a return of "no lands;" a plea on equitable grounds to a declaration against him for a false return, that the plaintiff misrepresented to the sheriff that the lands levied on were the lands of the execution debtor; *held*, to be no answer to the action. *Patterson v. Thomas*, (*Sheriff*), 530.

SHIP.

See DEMURRAGE.

Ship—Registry of—Sale of—Imp. Stat. 17 & 18 Vic., ch. 104—Con. Stat. of Canada, c. 41.]—*Held*, that a builder of a ship is not compelled by the statute to have his vessel registered before he can make a valid sale of her. 2nd, that a written instrument is not requisite to pass property in a vessel which it is not necessary should be registered under the act. *Chisholm et al. v. Potter*, 165.

SLANDER.

Slander—Husband and wife—Nonsuit.]—On an action brought against a husband and wife for slander, the declaration alleged the words constituting the slander to have been spoken by both the defendants, while the evidence proved the wife alone to have made use of the words complained of. On motion for nonsuit, *held*, that the de-

claration should have alleged that the action was brought against the defendants for words spoken by J. W., being the wife, &c., and that it was not therefore supported by the evidence. *John Wilson v. Jeremiah and Jane West*, 127.

SPECIAL.

Taxes how far covered by the ordinary words in a lease.—See LEASE, 2.

Endorsement on a bond given by sureties.—See SURETY, 2.

STATUTE.

see SURVEY.

Con. Stat. of Canada, ch. 89.—See ASHBURTON TREATY.

Con. Stat. of U. C., ch. 22.—See ASSESSMENT.

22 *Geo. II., ch. 46.*—See ATTORNEY.

Of Limitations.—See BILL OF EXCHANGE, 1.

12 *Vic., ch. 22.*—See BILL OF EXCHANGE, 1.

20 *Vic., ch. 3.*—See CHATTEL MORTGAGE, 3.

Con. Stat. of U. C., ch. 26.—See CHATTEL MORTGAGE, 4.

Con. Stat. U. C., ch. 56.—See DRIVING.

Con. Stat. U. C., ch. 90.—See EJECTMENT, 4.

23 *Vic., ch. 42, sec. 4.*—See IMMEDIATE EXECUTION.

Con. Stat. U. C., ch. 30, sec. 8.—See INTERPLEADER, 3.

12 *Geo. II., (Lotteries.)* See LAND.

Con. Stat. U. C., ch. 126.—See MAGISTRATE.

Of Frauds.—See PRINCIPAL—RAILWAY, 3.

Statute of Canada, 12 sec., ch. 22.—See PROMISSORY NOTE, 2.

16 *Vic., ch. 102, Con. Stat. of Canada, ch. 66.*—See RAILWAY, 1.

16 *Vic., ch. 180.*—See SCHOOL, 1.

13 & 14 *Vic., ch. 48.*—See SCHOOL, 2.

Con. Stat. U. C., ch. 47.—See LEASE, 7.

Imperial Stat. 17 & 18 Vic., ch. 104.—See SHIP.

Con. Stat. of Canada, ch. 41.—See SHIP.

Con. Stat. of U. C., ch. 54, sec. 264.—See TRESPASS, 2.

Con. Stat. Can., ch. 54, sec. 8, ch. 92, sec. 68.—See WAREHOUSE.

STOCKHOLDER

In railway company.—See RAILWAY, 1, 2.

SUBMISSION.

See ARBITRATION 2.

SURETY.

See BOND, 1.—PROMISSORY NOTE, 3.—BILL OF EXCHANGE, 5.

1. *Surety—Evidence of payment by plaintiff at request of defendant.*—T. being the owner of a lot of land mortgaged into the Kingston Building Society, and subsequently entered into an agreement for the sale of it to S., getting P. & B. to join him in a bond subject to a condition that if T., on a certain day in March, 1855, or as soon after as the Kingston Building Society should expire, should convey the land in question to the obligee, on his making certain specific payments to T., the bond should be void. T. having neglected to make the monthly payments due to the building society on the mortgage, under a power of

sale therein contained, the society, on the 13th September, 1855, sold the land to one W. for £200, being £135 more than the amount due to the society. P. B. & S. having heard of the sale entered into an arrangement with W., whereby he agreed, in consideration of the payment to him of £350, to convey the land to S. T. gave to P. an order to receive the balance of the £200 in the possession of the Building Society after the payment of the claim, which being deducted from the £350 to be paid, W. left the sum of £214 18s. 11d. to be made up to complete the payment to W. This sum was paid by P., B. & S., paying each one-third, amounting to £71 12s. 11d. T. was apprised of this arrangement, and said he would pay the whole amount if he could, and that he would make up \$100, which he did not do. The jury having found a verdict for P., for the amount paid by him and interest thereon, *held*, that there was evidence sufficient to justify a finding that the money was paid by P., at the request of the defendant T. *Preston v. Twigg*, 281.

2. *Surety—Action against on bond—Writ—Special endorsement—Judgment on default.*—A. & B. having become sureties for C., who was the receiver of moneys in a suit in Chancery, and who was to account yearly, were sued for C.'s default, on a specially endorsed writ and judgment signed for £490 16s. 10d. *Held*, upon a motion on affidavit, as to the facts, that £92 11s. 9d. was all that was due, that the claim was not such that a judgment upon a specially endorsed writ could be signed, there being nothing to shew that if the plaintiff should recover the amount endorsed, the object for which the bond was given

would be fully attained. *Buell v. Whitney*, 240.

3. *Surety—Guaranty—Action on.*—A. agrees to become surety to B. for all such advances as B. may make to C. during a limited period. B. makes no individual advances to C. at all, but during the period B. with D. a stranger to A. make advances to C. *Held*, that B. individually cannot recover from A. the amount of the advances so made. *Stevenson v. McLean*, 208.

SURVEY.

Survey—Boundary line—Numbering of lots—Application of statute.—Two surveyors being employed to divide the gore of land marked in the plan below (in the statement of case) ran lines as are therein dotted and named McLaurin's and McLeod's lines. The parties apparently acquiesced in McLeod's line for a time, but subsequently disagreed, and this action was brought to contest the division. *Held*, that the rule in the statute, that the course of the boundary line in each concession, on that side from which the lots are numbered shall be the course of the division or side line, not being applicable to the case, as these lines purport to number from the east, while the gore at the east of the concession is not numbered, the defendant is entitled to recover. *Alexander McDonald v. Ronald McDonald*, 374.

SURVIVAL.

Of action of seduction to mother.—*See SEDUCTION.*

TAVERN.

See TRESPASS, 2.
License.—*See BY-LAW.*

PREPARING.

Deed.—See BOND, 3.

PRINCIPAL.

Principal — Agent — Statute of Frauds—Contract—Delivery—Payment.—A. having verbally contracted with B., the agent of a undisclosed principal for the sale to and purchase by B. of certain goods &c., amounting in value to the sum of \$100 and more, but before any delivery or part payment, the name of the principal having been disclosed by B., held, that the contract was not binding before a part delivered or payment took place, and as neither took place before the disclosure by B. of his principal, he was not personally liable. *Haight v. Howard*, 437.

PRIVITY.

See WAREHOUSE.

PROCLAMATION.

Proclamation—Reward—Conviction—When necessary that it should take place before reward payable.—Declaration for reward of \$800 offered by the defendants to any person giving such information as would lead to the conviction of the murderer or murderers of certain persons therein named. The defendant pleaded that the plaintiff did not give such information, &c., and that the said murderer was not convicted, it appearing that the accused while waiting his trial, committed suicide in gaol. Upon demurrer, held, that the actual conviction of the party accused was a condition precedent to the recovery of the reward, and that the committing of suicide by the accused did not

entitle the plaintiff to a verdict. *Fortier v. Wilson et. al.*, 495.

PROMISSORY NOTE.

Promissory note—Interest recoverable at the rate drawn after maturity till payment.—Held, that interest is recoverable on a promissory note at the same rate for which it is drawn over six per cent. till payment. *Howland v. Jennings*, 272.

2. *Promissory note—Payable in Lower Canada, and payee and drawer residents of Upper Canada—Lex loci—Lex fori—Statute of Canada, 12 Vic., ch. 22.*—A person resident in Upper Canada being in Lower Canada, makes two promissory notes, each payable at a place certain in Lower Canada, several months after date, to another person also resident in Upper Canada, who at the time carried on business as a forwarder in Lower Canada. While the notes were still held by the payee, and after they were due, and more than five years before the commencement of the suit, the defendant and payee met together in Lower Canada, so that the payee might have brought an action against the defendant; the notes were after this endorsed to the plaintiffs, neither of whom were resident in Lower Canada; the notes fell due in July and December, 1854, and this action was commenced in September, 1860. Held, that the parties being residents in Upper Canada, when the notes were made, when they became due, and when they were dishonored, the statute of Canada, 12 Vic., ch. 22, sec. 31, did not bar the plaintiff's recovery, and that that statute applies to the remedy, and not to the contract itself. *Richards, J., dissentiente. Hervey et al. v. Prichard*, 329.

3. *Promissory note—Maker of, surety for the endorser—Notice of after becoming the holder—Release of surety thereby.*—Declaration on a promissory note made by defendant, endorsed by one O. T. M. to plaintiffs. Plea, on equitable grounds, that the defendant was surety for O. T. M., and made the note for his benefit without value, of which the plaintiffs became aware after they became the holders thereof, and after notice thereof gave time to O. T. M., and thereby released defendant. On demurrer, *held*, bad. *The Bank of Upper Canada v. Thomas*, 515.

4. *Promissory note—Executors—Given as such in carrying on business—Personal liability thereon.*—The defendants, as executors, purchased goods of the plaintiffs, and gave notes in the following form therefor. "—months after date, we, as executrix and executors of the late Benjamin Parsons, promise to pay Messrs. Kerr, Brown & Co., or order, at their office in Hamilton, \$—value received. (Signed,) Mary Parsons, James P. Stonehouse, George H. Parsons, executrix and executors of B. Parsons, deceased." *Held*, that the defendants were personally responsible thereon. *Kerr et al. v. Parsons, et al*, 513.

5. *Promissory note—Notice of dishonor—Action by original holder against endorser—How far an answer in another action by another endorser and holder against a prior endorser.*—Declaration on a promissory note, made by A. payable to B., (defendant,) endorsed by him to C., who endorsed to D., who endorsed to plaintiff, and on the common counts. Plea, that said note before it became payable was endorsed by plaintiff to one J. H. C. who endorsed it to S. B. H., who en-

dorsed it to the Commercial Bank, who were the holders when it matured, and until the recovery by defendant of a judgment upon an action brought by the said Commercial Bank, and that the notice of dishonor alleged to have been given by plaintiff to defendant is an alleged notice said to have been given by Commercial Bank to defendants in their suit, and no other notice; and that defendant in the suit between the Commercial Bank and himself recovered a judgment against the Commercial Bank, and that the plaintiff had notice of the action between the Commercial Bank and defendant, before he became the holder of the note. On demurrer, *held*, bad, the action between the Commercial Bank, the original holder, and the defendant being no answer to an action by any other party on the note who was a subsequent holder to the defendant. *Smith v. Burton*, 273.

6. *Promissory note—Brokers—Responsibility of one partner for the fraud of his co-partner committed on securities intrusted to co-partnership after the dissolution thereof.*—Plaintiff gave defendants, who were co-partners and brokers, two promissory notes, payable to their order to get discounted, and pay the proceeds to him, or to return the notes should they not be discounted. He afterwards drew upon the defendants for £200 on account of the notes. The defendants did not discount the notes while in partnership, but after the dissolution thereof defendant, in fraud of his co-partner, endorsed the partnership name on the notes, and passed them away, and applied the proceeds to his own personal use. *Held*, that the defendants were jointly liable, and that the draft for £200 did not annul the original

contract or affect the responsibility of defendant Heward. *Hammond v. Heward and Grier*, 261.

7. *Promissory notes—Bond given by executors on an accounting for balance due on certain promissory notes made by testator—How far an extinguishment of the original debt.*]

—Declaration on three promissory notes given by testator in his life time for £21 5s., £55, and £40 16s., respectively. Plea, that after testator died and the notes fell due, the plaintiff and defendants accounted together and struck a balance, for which the defendants gave their bond to pay out of the first moneys they should receive from the estate within eighteen months. *Held* bad, as not shewn to be given in satisfaction of the notes or of cross-demands, and cannot therefore be pleaded for more than a payment *pro tanto* for the amount of it. *Muir v. Lawrie et al.*, (*Executors*), 252.

8. *Promissory note—Assignment—How far the execution of an absolute release affects the original debt although the conditions are not fulfilled by assignor.*]—R. being indebted to B. and V. in the sum of \$979.76 gives his promissory note at six months, payable at the Bank of Montreal, in Guelph, with current rate of exchange on New York in September, 1859. In June, 1860, R. made an assignment, to which B. and V. were executing parties, which after reciting an agreement by R.'s creditors to accept five shillings in the pound from R., payable in six and twelve months, to be secured by promissory notes satisfactorily endorsed, and a covenant by R. to pay that sum, contained an absolute release of R. from all those executing it. The plaintiff before executing this instrument claimed the promised en-

dorsed notes, or to hold the original note till the compromise was paid. On the 6th of August, 1860, another assignment was made by R., in trust, till he should pay his creditors their dividend, and was sent to the plaintiffs for execution, with the statement that he (R.) could not get the security wanted, "the party that promised to become a partner drew back." This assignment the plaintiffs did not sign, because when the first ~~offer~~ fell through they sold the original note, and claimed to have nothing more to do with the matter. *Held*, that the giving of the promissory notes by R. was not a condition precedent to the delivery of the first assignment, and that the execution and delivery of it, as it contained an absolute release, operated as a discharge of the original debt. 2. That the deed of the 6th of August did not annul the former assignment. 3. That this action being brought prior to the 1st of January, 1861, (when the first instalment became due on the assignment) and the release in the instrument being absolute, the non-payment of that instalment did not remit the parties back to their original position, and the validity of the original assignment was not in question. *Benedict et al. v. Rutherford*, 213.

PROPERTY.

Right of, in mill gearing.]—See INTERPLEADER, 5.

PROVISIONAL.

Directors] — See JOINT STOCK COMPANY.

PUBLIC.

Body, raising of money by.]—See MANDAMUS.

PURCHASE.

See AGREEMENT, 2.

Of land.]—See LAND.

QUIET.

Enjoyment, covenant for.]—See LEASE, 1.

RAILWAY.

1. *Railway company — Stockholder—Liability of to creditor of company for unpaid calls and interest—Necessity of all capital being subscribed before becoming so—Stat. 16 Vic., ch. 102—Con. Stat. Can., ch. 66.*]—Declaration alleged that the H. & P. D. Railway Company were indebted to the plaintiffs in £12,500, for which a judgment had been recovered and an execution returned "*nulla bona*;" that the defendant was a stockholder in that company, and was liable to pay certain calls made by the company which he had not paid, and that the said calls, with interest, amounting to £297 10s., were due by him to the company, by means whereof the plaintiff (under 16 Vic., ch. 102) was entitled to demand and recover the said sum of money so due and in arrear from him for and in respect of the stock. Plea on equitable grounds, that by the statute 16 Vic., the company was incorporated for certain purposes, and it was enacted that the capital stock should be £500,000 in 20,000 shares of £25 each; that the defendant subscribed for stock on the understanding that the whole capital stock was to be subscribed; that the directors in the name of the company contracted with the plaintiffs, and one C. P., for the performance of certain work before the said capital stock was subscribed,

or a sufficient portion to afford a reasonable prospect that the company would be enabled to complete the railway; that the defendant never agreed that the railway or any portion thereof should be constructed, or any contract entered into by the company or directors without the whole capital stock was subscribed, and so defendant never was a shareholder. On demurrer, *held*, that by the statute 16 Vic., ch. 101, and the Railway Act (Stat. of Canada, ch. 66) it was not intended to make the subscription of the whole number of shares a condition precedent to the exercise of the powers conferred by the act, and that the defendant, by subscribing and paying his deposit, rendered himself liable to all the provisions thereof. *Moore et. al. v. Murphy*; *Moore et. al. v. Hudson*; and *Moore et. al. v. Chambers*, 444.

2. *Railway—Stockholder—Liability of to creditors of company for unpaid calls—Venue in action for—Return of nulla bona not necessary from all the counties through which the railway runs.*]—Declaration for the amount of ten shares of £10 each, in the Port Hope, Lindsay & Beaverton Railway Co., alleging a judgment recovered in the court, and a *fi. fa.* goods returned in one county *nulla bona*. Upon demurrer, *held*, that the judgment recovered in the court in Toronto was not the foundation of the action, and therefore the venue was not local. 2. That it is not necessary that a *fi. fa.* goods should be returned *nulla bona* from all the counties through which the railway runs, but that the onus of proof of fraud, or of there being goods of the company to satisfy the judgment, lay on the defendants, the plaintiff having obtained one return of *nulla bona*. 3rd. That it is not necessary that calls should be

